Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

KENNETH L. SMITH,
Petitioner,

v.

HON. MICHAEL L. BENDER, *et al.*,
Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Kenneth L. Smith,
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

QUESTIONS PRESENTED

1. Can a simulated judgment, null and void as a matter of state law, nonetheless constitute a "state court judgment" for purposes of the *Rooker-Feldman* doctrine?

2. Is the Bill of Rights and/or Supremacy Clause a waiver of sovereign immunity sufficient to hold the United States Government liable for damages resulting from illegal and/or tortious acts committed by authorized agents and/or those of the State of Colorado pursuant to a theory of respondeat superior?

OTHER PARTIES TO THE PROCEEDING

The Respondents are initial defendants who participated in the appeal in the Tenth Circuit. They are HONS. MICHAEL L. BENDER, NATHAN B. COATS, GREGORY J. HOBBS, JR, REBECCA LOVE KOURLIS, ALEX J. MARTINEZ, MARY J. MULLARKEY, and NANCY E. RICE, in their individual capacities, JOHN DOES 1-99 (whose identities are not known at this time), and THE UNITED STATES OF AMERICA. Tort claims against HON. JOHN W. SUTHERS, and FRIEDRICK C. HAINES were abandoned owing to recent decisions by this Court.

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OPINIONS BELOW

A copy of the published opinion of the Court of Appeals for the Tenth Circuit, *Smith v. Bender*, No. 09-1003 (10th Cir. Sept. 11, 2009) (unpublished), is included in the Appendix to this Petition at p. 62. A copy of the decision entered in the United States District Court for the District of Colorado on July 11, 2008 is at p. 77.

STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. §1254(1). Smith's timely-filed petition for rehearing en banc was denied on November 3, 2009; this petition is considered timely filed when mailed on or before February 1, 2009.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation,

> which shall not be diminished during their Continuance in Office.

Article III, Section 2, of the United States Constitution provides, in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The Preamble to the Bill of Rights provides, in pertinent part:

> THE Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides in relevant part: "... nor shall any person be ... deprived of life, liberty, or property, without due process of law; ...."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2(1) of Article 6 of the Colorado Constitution provides: "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law."

Section 9(1) of Article 6 of the Colorado Consti-

tution provides in pertinent part: "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein."

STATUTES INVOLVED

Colorado Revised Statute § 13-4-101 provides, in pertinent part: "Judges of the court of appeals may serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court."

Colorado Revised Statute § 13-4-102(1) provides, in pertinent part: "Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts...."

Colorado Revised Statute § 13-4-110(1)(a) provides:

> When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a

summary manner, and its determination shall be conclusive.

Colorado Revised Statute § 16-6-201 provides, in pertinent part:

(1) A judge of a court of record shall be disqualified to hear or try a case if: [...]

(d) He is in any way interested or prejudiced with respect to the case, the parties, or counsel.

(2) Any judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself.

STATEMENT OF THE CASE

The essence of Smith's grievance is that judges who are properly named as defendants in tort sat in judgment of their own cause, in open defiance of this Court's hide-bound pronouncement to the contrary. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

Smith filed a tort action in federal district court under *Carey v. Piphus*, 435 U.S. 247 (1978), which only required him to prove that he had a federal right (here, to have grievances decided by a fair and independent tribunal, and equal protection of the law), and that he did not get it. The lower courts invoked the *Rooker-Feldman* doctrine to dismiss it, despite the fact that the legality of the act complained of had never been decided in a court of law. Thus, the matter could properly be disposed of in a *per curiam* decision, as the law is clearly established, and the lower courts are in open defiance of it. *See e.g., Erickson v. Pardus*, No. 06–7317, 551 U. S. ____ (2007).

By its very nature, a constitution creates a series of adhesion contracts, commonly referred to as "citizenship" and "statehood." *See*, Mass. Const. (1780), Preamble. Defendant United States has a contractual duty to Smith to furnish "the protection of the laws whenever he receives an injury," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), and is currently in breach of its obligation. Accordingly,

if this Court extends absolute judicial immunity to agents of the vassal kingdom of Colorado, it must assume liability in *respondeat superior* as suzerain for damages caused thereby, under any theory of sovereignty embraced by our Framers.

SUMMARY OF THE ARGUMENT

The essence of this case was captured by the late Charles Schulz:

I GUESS IF YOU HAVE A SIGNED DOCUMENT IN YOUR POSSESSION, YOU CAN'T GO WRONG. THIS YEAR I'M REALLY GOING TO KICK THAT FOOTBALL!
AAUGH!

The *signed document*, of course, is the Constitution. It is the source of this Court's authority and thus, beyond its ability to re-write *sua sponte*. *See, Kamper v. Hawkins*, 3 Va. 19 (Va. 1793) (state-law precursor); *Marbury v. Madison, supra*.

"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Id.* As such,

if the Government acts by and through its agents and causes injury through an unauthorized act, it must either assume responsibility for the damage, or allow its agents to be sued. To hold otherwise is to confess that we are no longer a nation of laws.

This Court hears eighty cases per year, under a presumption that it has to make certain that it gets every one of them just right, because every other court in the land -- and every citizen -- is relying on it for guidance. But if this Court is no longer willing to insist that our lower courts follow its dictates, its Herculean efforts are a staggering waste of your time (and our money). But more to the point, if we as citizens can no longer reasonably rely on its pronouncements as an authoritative statement of what "the law" is, there is no "law" left to preserve.

The threshold question in this case is whether a decision entered by a state supreme court which is void on its face as a matter of state law can be a "final state-court judgment" for purposes of the *Rooker-Feldman* doctrine. If the answer is no, the decision below constitutes plain error, and ought to be reversed. But if the answer is yes, this constitutes a fundamental breach of the contract of citizenship, giving rise to an action sounding in either contract, tort, or both. And this, in turn, raises the issue of sovereign immunity.

While it is inherent in the nature of a sovereign not to be amenable to suit by an individual without his consent, the King of England always gave his consent whenever justice required. Under our law, **the Bill of Rights and Fourteenth Amendment necessarily constitute express consent, for without it, the Bill of Rights becomes a bill of goods.**

No sane man would ever consent to adoption of a constitution that empowered his government to spike his coffee with LSD *as an experiment*, with absolute impunity. Sovereign immunity must have limits, and they are defined by the Bill of Rights.

SUMMARY OF PERTINENT FACTS

Despite the fact that they were defendants in tort and admitted the conflict, the natural Defendants in this case entered a 'decision' in the case of *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam). As this was a flagrant violation of his Fourteenth Amendment right to have grievances heard by a fair and independent tribunal, *Turney v. Ohio*, *supra*, Smith filed a Section 1983 action in federal district court, naming the United States as a contingent defendant on the grounds that it is ultimately responsible for the quality of justice dispensed in our Nation's courts.

The dispositive fact in this case is that the natural Defendants made not one, but two decisions. The first was the decision on August 18, 2005 as to whether Smith's appeal of the state district court decision was to be heard in the state's Court of Appeals or Supreme Court. But while that court had jurisdiction over the question as a matter of statutory law, the justices were required by law to recuse themselves. As their decision to take the case was void as a matter of Colorado law, any decision they rendered was done without colorable jurisdiction.

The legal significance of this is that it deprives the natural Defendants of the obvious benefits of absolute judicial immunity. *See, Bradley v. Fisher*, 80 U.S. 335, 352-53 (1871) (where judge lacks jurisdiction to rule, "no excuse is permissible.").

A. The Colorado Supreme Court's Actions

1. The Colorado Supreme Court Is a Court of Limited Jurisdiction, the Scope of Which Is Drawn Narrowly By the State Constitution.

The framers of the Colorado constitution took pains to limit the reach of the state supreme court, which were always respected. That court cannot expand its own jurisdiction by rule. *People ex rel. City of Aurora v. Smith*, 424 P.2d 772 (Colo. 1967). The state legislature cannot expand the supreme

court's original jurisdiction beyond limits expressly set forth in the state constitution, *People v. Carter*, 527 P.2d 875 (Colo. 1974), but can take it away, *Denver County Court v. Lee*, 439 P.2d 737 (Colo. 1968), provided they don't eliminate their power to perform final reviews. *In re Constitutionality of Court of Appeals*, 26 P. 214 (Colo. 1890).

The Colorado constitution explicitly designated its district courts as courts of "general jurisdiction," Colo. Const. art. 6, § 9(1), and "[t]he [Colorado] supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only."[1] Id. art. 6, § 2(1). Also, "[i]t is likewise clear from these provisions that the jurisdiction of both courts being created by the Constitution, the jurisdiction of each was necessarily excluded from the other." *Friesen v. People ex rel. Fletcher*, 192 P.2d 430, 432 (Colo. 1948).

2. Background History of the Case

Smith filed a lawsuit against the justices of the Colorado Supreme Court alleging an array of due

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[1] The Colorado Supreme Court enjoys original jurisdiction to issue extraordinary writs/ Colo. Const. art. 6, § 3. It may write court procedural and administrative rules. Id., § 21 exercise "general superintending control over all inferior courts," Id., § 2(1), and give advisory opinions to the executive and legislative branches when asked. Id., § 3.

process and Americans With Disabilities Act violations in Denver District Court under a theory of law that was successful under legally indistinguishable facts in the Second Circuit. *Diblasio v. Novello*, 344 F.3d 292 (2d Cir. 2003). He also raised facial challenges, grounded in federal law, to the constitutionality of the Colorado bar admission statute. As federal civil rights claims may be decided in state courts of general jurisdiction, *Claflin v. Houseman*, 93 U.S. 130 (1876), Smith had a clear legal right to be heard in that court. Yet, inventing a state-law *Rooker-Feldman* doctrine in a court of general jurisdiction, the trial court judge held that he did not have jurisdiction to hear Smith's claims. Naturally, he appealed.

3. Judicial *Legerdemain*

Colo. Rev. Stat. § 13-4-102(1) provides, in pertinent part, that "[a]ny provision of law to the contrary notwithstanding,[2] the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts." As such, Smith's appeal was properly within the jurisdiction of the Colorado Court of Appeals.

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[2] Statutory exceptions are narrow, involving such obscure matters as water law and, actions of the state public utilities commission. Colo. Rev. Stat. § 13-4-102(1)(a)-(h).

Statutory mandates notwithstanding, the Court of Appeals tried to divest itself of jurisdiction, invoking Colo. Rev. Stat. § 13-4-110(1)(a), providing the Supreme Court legal authority to summarily determine jurisdiction. Complaint, *Smith v. Bender* [Dkt. #1], No. 07-cv-01924-DME-KMT (D.Colo. filed Sept. 11, 2007) at 6 (facts judicially noticed by the trial court). But while the state supreme court gained jurisdiction to decide the question, it did not have an unfettered discretion, for "absent constitutional authority, it is equally clear that [it] cannot adopt a rule which changes jurisdiction of a court contrary to a provision of a statute," *Bill Dreiling Motor Co. v. Court of Appeals*, 468 P.2d 37, 41 (Colo. 1970). Moreover, on account of their conflicts of interest, the natural Defendants were precluded as a matter of Colorado statutory law from acting in their official capacities in connection with that question.

4. A Judge Cannot Decide A Matter Without Jurisdiction.

"Without jurisdiction, the court cannot proceed at all in any cause, *Ex parte McCardle*, 74 U.S. 506, 514 (1869), and a judge with a personal financial interest in a case cannot exercise jurisdiction over it. Last Term, this Court declared that

> the Due Process Clause incorporated the

> common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."

Caperton v. A. T. Massey Coal Co., No. 08-22 (U.S. Jun. 9, 2009) (slip op. at 6) (quoting *Tumey, supra*).

Colorado law goes even further, imposing an affirmative obligation upon judges to recuse: "Any judge who knows of circumstances which shall disqualify him in a case shall, on his own motion, disqualify himself." *Colo. Rev. Stat. § 16-6-201(2)*. Once that judge is obligated to recuse himself, he immediately loses all jurisdiction in the matter except to transfer the case. *Erbaugh v. People*, 140 P. 188, 190 (Colo. 1914)). Further, a judgment rendered in the face of a jurisdictional defect is void. *Davidson Chevrolet v. City and County of Denver*, 330 P.2d 1116 (Colo. 1958).

Judges of the Colorado Court of Appeals may "serve in any state court with full authority as provided by law, when called upon to do so by the chief justice of the supreme court." *Colo. Rev. Stat. § 13-4-101*. In every jurisdiction with a similar statutory provision, conflicted supreme court jus-

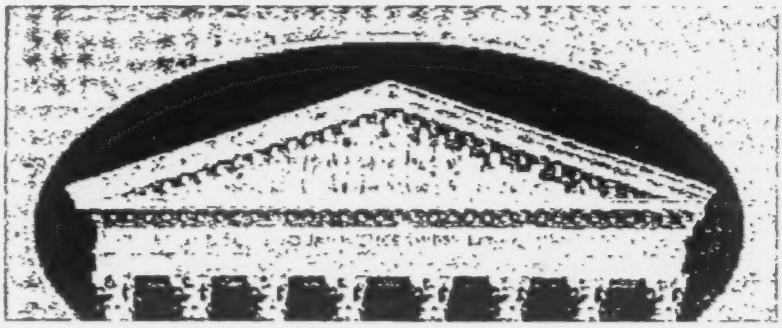
tices are required to recuse. *E.g., Mosk v. Superior Court of Los Angeles*, 601 P.2d 1030 (Calif. 1979) (collecting cases); *Sullivan v. McDonald*, 913 A.2d 403 (Conn. 2007). As the "Rule of Necessity" only applies in cases of bona fide necessity, *see United States v. Will*, 449 U.S. 200, 214 (1980), and sixteen non-conflicted judges were available and authorized by statute to hear it, it cannot trump Smith's right to have his grievances decided by a fair and independent tribunal.

The Colorado legislature also took great pains to ensure that judges could not abuse their high office for personal benefit. A judge "who knows of circumstances which shall disqualify him in a case shall, on his own motion, disqualify himself." Colo. Rev. Stat. § 16-6-201(2). And once a judge is obligated to recuse, s/he "immediately loses all jurisdiction in the matter [except transfer it to another judge]." *People ex rel. Burke v. District Court*, 152 P. 149, 152 (Colo. 1915) (quotation omitted).

B. The Unavoidable Legal Implications

As the natural Defendants could not even gain jurisdiction over said case as a matter of law, their actions are extra judicial and void. Their decision is not a final state court judgment under Colorado law; they can lay no claim to judicial immunity. *Bradley v. Fisher, supra.*

REASONS WHY THE WRIT SHOULD BE GRANTED



This is the essence of the bargain of American citizenship: That "all men are created equal," *The Declaration of Independence* ¶ 2 (U.S. 1776), and entitled to equality before the law.

For this reason, this Court has a duty to ensure that lower court judges may not defy its dictates. *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997). Smith maintains that this Court has the duty to exercise the judicial power, and that it cannot lawfully be impaired by Congress in a manner eviscerating the Bill of Rights and the equal justice under law it affords. Accordingly, 28 U.S.C. § 1254(1) is unconstitutional, to the extent that it gives this Court any discretion as to whether it is to correct plain error at the lower court level; Smith is litigating that issue in the courts of the District of Columbia. *See, Smith v. Thomas*, No. 09-cv-1926-JDB (filed Oct. 3, 2009).

While this matter could easily be disposed of in

a *per curiam* opinion, there is no recognized legal mechanism by which this Court can be required to act. But if it does nothing, it does nothing *as an authorized agent* of Defendant United States. By ratifying the patently illegal acts of a political subdivision it created, it assumes liability sounding in contract and/or tort under a theory of *respondeat superior*. Accordingly, Smith mounts a direct challenge to the modern doctrine of sovereign immunity, on the grounds that it is an act of judicial lawmaking forbidden by Article III.

Sovereign immunity is an odious doctrine, one which has been eschewed by the civilized world. Three Justices are on record opposing it, three are on record in favor of it, and three have yet to be heard from. As the better 'originalist' argument is against the doctrine, and the prevailing view has never mustered more than a threadbare majority on the Court, this is a question ripe for reconsideration.

I. A STATE COURT JUDGMENT VOID ON ITS FACE CANNOT PROPERLY TRIGGER APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE.

The *Rooker-Feldman* doctrine applies only to "limited circumstances" where "the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking

review and rejection of that judgment." *Exxon-Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005). Accordingly, proper application of the rule necessarily presupposes the existence of a final state court judgment.

For the reasons explained in detail above, the ersatz decision rendered in *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam) was void on its face as a matter of Colorado law. As such, it is a nullity. The Colorado Supreme Court explains:

> A void judgment is a simulated judgment devoid of any potency because of jurisdictional defects only, in the court rendering it. ... A judgment entered where such defect exists has neither life nor incipience, and a court is impuissant to invest it with even a fleeting spark of vitality, but can only determine it to be what it is – a nothing, a nullity. Being naught, it may be attacked directly or collaterally at any time.

Davidson Chevrolet, 330 P.2d at 1118-19 (citation omitted); *see, E.J.R. v. District Court*, 892 P.2d 222 (Colo. 1995) (explaining distinction between void and voidable judgments).

This, in turn, begs an obvious question: **How can a simulated judgment which has no legal force as a matter of Colorado law qualify as a "state court**

judgment" for purposes of the *Rooker-Feldman* doctrine? Neither the trial court nor the appellate court even acknowledged this obvious question -- to say nothing of addressing it. Smith submits that the explanation for the local federal courts' willful refusal to address it is equally obvious.

A. On Courtroom Corruption

> It is widely known that many state court judges and some lower court judges play favorites among litigants and lawyers. Roy Cohn once famously quipped, "I don't care if my opponent knows the law, as long as I know the judge." ... I have seen it with my own eyes in the courts of Boston, New York, and elsewhere.

Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* 116 (Oxford U. Press, 2001). Judicial corruption is ubiquitous, from Albania to Zaire; to deny the facts is illogical. And if you know what to look for, says notable human rights activist Geoffrey Robertson, it is easy to spot, if you know what to look for:

> Bribes are facilitated by lawyers, court clerks and police, who take their cut on behalf of clients who do not complain when they win their case, are acquitted or released on bail as a result. Judges who are political lickspit-

> tles, ruling in favour of the state, police or army because they wish for favours, promotion or post-retirement appointments, **can usually dress up their wrong decisions with bogus legal arguments or manipulate the facts to support their findings.**

Geoffrey Robertson, Q.C., The Media and Judicial Corruption, in Transparency Int'l., *The 2007 Global Corruption Report*, 109 (Cambridge U. Press 2007) (emphasis added). And it is not confined to Third World toilets. As Monroe Freedman observes:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about **judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.**

Monroe Freedman, Speech (to The Seventh Annual Judicial Conference of the United States Ct. of Appeals for the Federal Circuit) (May 24, 1989), as reprinted in 128 F.R.D. 409, 439 (1989).

B. The Tenth Circuit Makes the World Wrestling Federation Look Credible By Comparison.

1. When Article III Judges Can't Get First-Year Civil Procedure Right, You Know Something Is Amiss.

The decision below is a veritable monument to outcome-based jurisprudence. It is difficult to find a single opinion where so many basic rules of law were mangled beyond recognition:

> In order to fully address the issues raised by Mr. Smith in this appeal, however, we also point out the following fallacies in his arguments. First, to the extent Mr. Smith is seeking to relitigate his federal-law challenges to the Colorado Supreme Court's denial of his admission to the bar of the State of Colorado, those challenges are barred by the doctrines of res judicata and collateral estoppel by virtue of: (1) this court's final decision in Mr. Smith's prior appeal to this court, see Smith v. Mullarkey, 67 F. App'x 535, 538 (10th Cir. 2003) (applying Rooker-Feldman doctrine and holding that district court correctly determined that it did not have subject matter jurisdiction over Mr. Smith's federal-law claims challenging the denial of his admission to the Colorado bar); and (2) the fact that the United States

> Supreme Court denied Mr. Smith's petition for a writ of mandamus and/or prohibition pertaining to that final decision, see In re Smith, 540 U.S. 1103 (2004).

Smith v. Bender, No. 09-1003 (10th Cir. Sept. 11, 2009) (unpublished), slip op. at 5-6.

As Article III judges are generally regarded as being among the best in the world, that passage is shocking. Anyone even vaguely familiar with the *Rooker-Feldman* doctrine would know that it cannot be invoked to defeat claims for prospective relief. *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983). Anyone even vaguely familiar with operation of this Court would know that the denial of certiorari is not a review on the merits. *Brown v. Allen*, 344 U.S. 443, 489-97 (1953) (opinion of Frankfurter, J., stating the position of a majority of the Court). Anyone vaguely familiar with *res judicata* would know that it only applies to a decision of a competent court on the merits. *Nwosun v. General Mills Rests., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) (preconditions for *res judicata*). Finally, anyone even vaguely familiar with the doctrine of collateral estoppel knows that it only applies against a party who had a full and fair opportunity to litigate the issue. *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000).

The Panel wasn't simply content with mangling precedent. Even in his original lawsuit, Smith took care to only raise issues that, based on the precedents of this Court and the Tenth Circuit, would lie safely outside the maw of *Rooker-Feldman*. In this case, the justices violated his well-established federal right to have federal civil rights claims and/or facial challenges to a statute grounded in federal law heard in a state court of general jurisdiction. *Claflin*, supra. This constitutes an "independent claim" which, even in the Tenth Circuit, has always been outside the ambit of *Rooker-Feldman*. *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479-80 (10th Cir. 2002). **In essence, the Panel falsified the facts of the case.**

2. "*That's Some Catch, That Catch-22*."[3]

In a gambit worthy of Heller, the Panel does a procedural pirouette, tacitly acknowledging that Smith had a winning argument, while deftly avoiding determination of it:

> Mr. Smith claims that, in *Smith v. Mullarkey*, the Justices of the Colorado Supreme Court "violated his well-established federal right to have [his] federal civil rights claims and/or facial challenges to a [state] statute

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[3] Joseph Heller, *Catch-22*, 46 (Simon & Schuster, 1961).

> grounded in federal law decided in a state court of general jurisdiction." Aplt. Opening Br. At 15 (citing *Claflin v. Houseman*, 93 U.S. 130 (1876)). Mr. Smith further argues that "[t]his constitutes an 'independent claim,' which has always been outside the ambit of the *Rooker-Feldman* doctrine." *Id.* (citing *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479-80 (10th Cir. 2002)).

Smith v. Bender, slip op. at 7.

Again, the paw-prints of "outcome-based jurisprudence" are unmistakable. The Panel "forgot" that a federal court may not accept hypothetical jurisdiction over an issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998). **Smith couldn't reach the substantive issue, as the case had been dismissed on jurisdictional grounds**. *Smith v. Bender*, No. 07-cv-1924-MSK-KMT (Jul. 11, 2008). On the one hand, if he argues the point, it is frivolous, and he opens himself to sanctions ... but on the other, if he doesn't, the Panel invokes hypothetical jurisdiction and deems it to be abandoned.

"That's some catch, that Catch-22."

2. The Tenth Circuit Has Always Used the *Rooker-Feldman* Doctrine As a Tool of Oppression.

The *Rooker-Feldman* doctrine "has produced nothing but mischief for 23 years." *Lance v. Dennis*, No. 05-555, 546 U.S. ___ (2006) (Stevens, J., dissenting, slip op. at 2). While it is innocuous if kept within the narrow bounds this Court has set for it, the Tenth Circuit transformed it into a Disneyland of despotism.

Officially, the Tenth Circuit "is convinced that the *Rooker-Feldman* doctrine does not bar a federal action when the plaintiff ... lacked a reasonable opportunity to litigate claims in state court." *Johnson v. Rodrigues*, 226 F.3d 1103, 1110 (10th Cir. 2000). This exception ensures that a state cannot block access to federal court by refusing to allow issues to be raised in state courts. *Lynk v. LaPorte Superior Ct. No. 2*, 789 F.2d 554, 564 (7th Cir. 1986). Without this exception, *Rooker-Feldman* would be unconstitutional, since it would have the effect of depriving plaintiffs "of any forum, state or federal, where [they have] a reasonable opportunity to present" their federal constitutional claims. *Wood v. Orange County*, 715 F.2d 1542 (11th Cir. 1983).

In the real world, the Tenth Circuit's use of the *Rooker-Feldman* doctrine is invariably outcome-based, as exemplified here:

> [Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights. **Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...**

Smith v. Mullarkey, 67 F.App'x. at 535, slip op. at 4 (unpublished; emphasis added).

In this case, judicial analysis is so simple, a caveman could do it: If condition X (an applicant challenges the facial constitutionality of a bar admission rule) is true, then Y (a lower federal court must hear his claim under Feldman). Condition X is true (a fact the Tenth Circuit panel openly admitted in the highlighted text). Therefore, Y (a lower federal court must hear that claim).

This is what Smith refers to as "designer law": an unpublished decision, affecting one and only one set of litigants, in open and notorious defiance of the binding precedent of this Court. It is a naked act of sheer judicial will, far beyond the legitimate contours of the Article III judicial power.

II. ARTICLE III IS AN ABSOLUTE LIMIT ON JUDICIAL DISCRETION.

Where rights begin, your discretion ends: The proper boundaries of the Article III judicial power are defined by the rights that constrain them. A judge may not write laws, as that is the province of the legislative branch. *The Federalist No. 78.* A lower court judge may not defy the dictates of a superior court within its jurisdiction. *State Oil Co. v. Khan*, 522 U.S. at 20. And, more importantly for purposes of this case, the Article III judicial power is necessarily constrained by rights retained by the people under the Bill of Rights, whether they are enumerated or not.

A. Procedural Rights Preserve Natural Rights.

This Court has declared that as American citizens, we are entitled to equality before the law, *United States v. Bajakajian*, 524 U.S. 321, 338 (1998) (quoting dissent by Kennedy, J., *id.* at 353, establishing an unanimous agreement on this point), to procedural due process, *Carey, supra*, to have grievances heard by a fair and independent tribunal, *Tumey, supra*, to be able to rely upon the pronouncements of this Court as an authoritative exposition of what "the law" is, *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970), and to an effective remedy when those rights are wrongfully invaded. *Marbury v. Madison, supra.* These are

rights emanating from the contract of citizenship, and essential to securing the benefits thereof. As Justice Moody famously observed, "[t]he right to sue and defend in the courts is the alternative of force ... the right conservative of all other rights." *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907).

B. Article III Defines the Judicial Power Narrowly and Precisely.

Article III judges are the only American officials who enjoy a freehold in office; this freehold is conditioned on the maintenance of so-called "good Behaviour" in office. U.S. Const. art. III, § 1. In the course of debate at the Virginia Ratification Convention, James Madison asserted that "where a technical word is used, all the incidents belonging to it necessarily attended it." 3 Elliot, *Debates on the Federal Constitution* 531 (1836). This view was invoked by Judge Pendleton, John Marshall, and Edmund Randolph in subsequent debate. *Id.* at 546, 558-9, 573. If it was unnecessary for the Framers to re-define technical words such as "pardon," *United States v. Wilson*, 32 U.S. 150 (1833), it follows that "good behavior" is defined by English law.

While the King could do no wrong, his courtiers often did. As such, the common law developed a remarkably effective system for policing officials who abused the powers of the magistracy. If the

government owed you a duty, you had a remedy in mandamus. If you were victim of a crime, you prosecuted the perpetrators yourself. If you were wrongfully imprisoned, you were entitled to challenge your imprisonment through a writ of habeas corpus. And if a public official who had life tenure abused his authority, you could remove him from office through a writ of *scire facias*.

Although most agents of the Crown served "at the pleasure of the King," many officials received a freehold in their offices, conditioned on "good behavior." *See e.g.*, 4 E. Coke, *Inst. of the Laws of England* 117 (re: Baron of the Exchequer). Lesser lords were given the authority to bestow freeholds, creating a multi-tiered political patronage system where everyone from paymasters to parish clerks enjoyed job security. *See, Harcourt v. Fox* [1692], 1 Show. 426 (K.B.) (clerk of the peace).

At common law, the good behavior tenure of officeholders was originally enforced by the sovereign through the writ of *scire facias*. But as this power concerned only the interests of his subjects, and the King exercised it only *in parens patriae*, he was bound by law to allow the use of it to any subject interested. Blackstone explains:

> WHERE the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted, or where the patentee hath

> done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of scire facias in chancery. This may be brought either on the part of the king, in order to resume the thing granted; or, if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a scire facias.

3 William Blackstone, *Commentaries on the Laws of England* 260-61 (1765).

By making an officeholder subject to removal for violating it, the condition of "good behavior" defined the powers of a given office. Sir Edward Coke listed three grounds for the forfeiture of that tenure: abuse of office, nonuse of office, and willful refusal to exercise an office. Saikrishna Prakash and Steve D. Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72, 90 (2006) (citing Coke's *Institutes*). Blackstone added that "the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office [could be prosecuted] either by impeachment in parliament, or by information in the court of king's bench." 4 Blackstone, *Commentaries* at 140-41. Thus, by implication, the duty to be fair and impartial was an integral part of the 18th Century English judge's job description.

More critically for purposes of this dispute, the "abuse of office" condition seriously curtails the judge's freedom of action. The Framers of our Constitution envisioned judges as interpreters of the law, as opposed to (self-appointed) authors. Alexander Hamilton explained that to "avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them." The Federalist No. 78 at 442 (A. Hamilton) (Isaac Kramnick ed., 1987). Blackstone asserted that a judge's duty to follow precedent was derived from the very nature of the judicial power itself: a judge is "sworn to determine, not according to his own judgments, but according to the known laws." 1 Blackstone, *Commentaries* at 69. A century earlier, Coke wrote that "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion." 1 E. Coke, *Institutes* at 51. As in all but the most exotic cases, the law has been established, a judge was seen as little more than an administrator, playing what Professor Llewellyn wryly called "the game of matching cases." Karl Llewellyn, *The Bramble Bush* 49 (1960). As such, a judge's willful refusal to faithfully apply established law in a dispute violated his good behavior tenure, constituting valid grounds for removal.

C. The Framers Never Intended To Give Federal Judges the Despotic Powers They Arrogated To Themselves.

A. In some countries a single man makes the laws according to his own pleasure.
Q. What is such a government called?
A. A *Despotism*, or absolute monarchy: and the person who thus rules is a Despot, or absolute monarch.

Arthur J. Stansbury, *Elementary Catechism On the Constitution of the United States* 18-19 (Hilliard, Gray, 1828) (italics in original).

In America, we call him a federal judge.

1. Under the Framers' Constitution, a Judge Was More Father-Confessor Than Black-Robed Despot.

In the *Federalist*, Alexander Hamilton referred to the federal judiciary as the "weakest" branch, The Federalist No. 78 at 437, with good cause: the colonial judge could scarcely blow his nose without a note from the jury foreman, signed in triplicate. The ultimate power to decide both fact AND law resided with the jury; the trial judge was mainly an administrator, and source of objective counsel on the state of the law for the jurors:

> [In] 1793 John Jay, sitting as chief justice of the United States, informed a civil jury that while the court usually determined the law and the jury found the facts, the jury nevertheless had "a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." "[B]oth objects," Jay concluded, "are lawfully, within your power of decision."

"The Jury and Consensus Government in Mid-Eighteenth-Century America", William E. Nelson, article in *The Bill of Rights: Original Meaning and Current Understanding* (ed. E. W. Hickok, Jr., Univ. Press of Va. 1991, reprinted at http://www.constitution.org/jury/pj/nelson.htm (unpaginated).

In law school, students are taught that *Marbury v. Madison* was *sui generis*. Its precursor is *Kamper v. Hawkins, supra*, a 1793 Virginia case interpreting that state's constitution. It was presided over by such notables as Spencer Roane and St. George Tucker, whose seminal treatise on Blackstone translated the English common law for domestic use. It was Tucker's view that a judge should not stray beyond the narrowly-circumscribed bounds of his office:

> If the principles of our government have established the judiciary as a barrier against the possible usurpation, or abuse of power

> in the other departments, how easily may that principle be evaded by converting our courts into legislative, instead of constitutional tribunals?
>
> To preserve this principle in its full vigour, it is necessary that the constitutional courts should all be restrained within those limits which the constitution itself seems to have assigned to them respectively.

Kamper v. Hawkins, 3 Va. at 88 (opinion of Tucker, J., seriatim). Judge Tucker apprehended the danger, as did Judge Tyler, who declared that "I will not in an extra-judicial manner assume the right to negative a law, for this would be as dangerous as the example before us." *Id.* at 61 (opinion of Tyler, J., seriatim). And in the wake of *Marbury v. Madison*, Thomas Jefferson warned that to anoint judges as ultimate arbiters of constitutional questions was "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." Thomas Jefferson, *Letter* (to William C. Jarvis), Sept. 28, 1820, at 1.

While the Marbury Court claimed the nominal right to judicial review, in the first four-score years of our Republic, it never exercised it, ending with *Scott v. Sandford*, 60 U.S. 393 (1857) (invalidating the Missouri Compromise). In fact, it really was the *weakest* branch.

2. *Boni Judicis est Ampliare Jurisdictionem*

It is the part of a good judge, the maxim goes, to expand his jurisdiction. The American judiciary has taken that maxim to heart, as the short history of American jurisprudence is judges, grasping for power. The overpowering role of the modern federal judiciary would have surprised Hamilton and mortified Jefferson; in later letters, he repeatedly warned recipients of the storm that was to come. "The constitution ... is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." Thomas Jefferson, *Letter* (to Spencer Roane), Sept. 6, 1819 at 1.

More to the point, our imperious judiciary has written a "constitution" no sentient human being would ever voluntarily consent to. It declares – with scarcely even a whiff of subtlety -- that the former Republic once known as the United States of America is a *regime*, governed by a "judicial oligarchy," Robert H. Bork, Our Judicial Oligarchy, *First Things* 67 (Nov. 1996) at 21, brought about by what he accurately described as a "judicial coup d'êtat." R. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (New York: AEI Press, 2003), at 13.

No less an authority than Justice Thomas concurs, in noting that the structure of our Constitution and Bill of Rights was the most certain protector of our rights as individuals:

> [I]t was the structure of the government that was supposed to protect our liberty. And what has happened through the years is that the protections afforded by that structure have been dissipated. So my opinions are often about the undermining of those structural protections.

A Conversation with Justice Clarence Thomas, 36 *Imprimis* Vol. 10 (Oct. 2007) at 6.

As Judge Tucker and Jefferson both observed, the most important structural protection of liberty was the separation of powers. Courts could only "declare the sense of the law; [for] if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist No. 78 at 440 (A. Hamilton). Modern judges have utterly obliterated that prudential restraint, re-writing the Constitution at will, effectively "designing a Constitution for a country I do not recognize." *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

As a practical matter, the modern judge only follows so-called *binding* precedent when it takes him right where he wanted to go in the first place. Even the plain words of the Eleventh Amendment fell to the "judicial veto" in *Hans v. Louisiana*, 134

U.S. 1 (1890). John Paul Stevens, "Two Questions About Justice," 2003 Ill. L. Rev. 821, 824.[4] Still, the most egregious example of judicial usurpation in history might be *Pierson v. Ray*, 386 U.S. 547 (1967).

In declaring that the "any person" of Section 1983 really meant "any person but us judges," the Pierson court laid waste to an array of established canons of statutory construction, including the plain meaning rule, *see, Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (collecting cases), reliance on legislative history if the statute is unclear, and the principle that remedial statutes are liberally construed, **a rule that the Court relied upon literally one day earlier** (in *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967)).

These days, lower courts routinely write *designer law*, applying to one and only one set of litigants, with the ultimate goal of extinguishing meritorious *pro se* cases. Appellate courts are willing accomplices in this charade, as some assign a case to a panel and curtly dispose of it the same day. *See, Docket, Harrington v. Wilson*, No. 06-1416 (10th Cir. Jun. 7, 2007)(unpublished) (withdrawn) (assigned, decided, and screwed up royally in a single day).

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[4] A broader version of the Amendment, corresponding to the illegitimate judicially-created one this Court observes today, was introduced by Rep. Theodore Sedgwick (MA), and rejected. Stevens, Two Questions at 824.

III. THE MODERN DOCTRINE OF SOVEREIGN IMMUNITY IS A CLASSIC CASE OF JUDICIAL LAWMAKING.

Smith proceeds under the presumption that there is one and only one correct way to interpret the Constitution. The most effective summation of this comes, as it always seems to, from the pen of Thomas Jefferson:

> Our peculiar security is in possession of a written constitution. Let us not make it a blank paper by construction. If [public officials' powers are boundless] then we have no constitution. If it has bounds, they can be no other than the definition of the powers which that instrument gives.

Thomas Jefferson, Letter (to Wilson Nicholas), Sept. 7, 1803 at 2. To put it simply, ***either the Constitution is dead, or our Republic is.*** As Justice Scalia adroitly put it, "the Constitution that I interpret and apply is not living but dead — or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted." Antonin Scalia, God's Justice and Ours, *First Things* (May, 2002) at 17.

Our Constitution can be summarized in a single phrase: "Do to others what you would have them

do to you." Matt. 7:12 (NIV). Democracies always failed because eventually, the strong would overwhelm the weak. The republic arms the weakest with the shield and sword of the law, so that they might withstand the onslaughts to come.

They declared that the purpose of government was to secure our individual God-given rights, and that whenever government becomes destructive to these ends, it should be abolished. Declaration Of Independence ¶ 2. And surely, there is nothing more destructive to such ends than a government that cannot be held to account by the individual citizen.

A. The Framers' Understanding of Sovereign Immunity Was Radically Different Than the Modern Iteration.

As Justice Scalia observed, domestic sovereign immunity was not part of the English common law known to the Framers. Antonin Scalia, "*Historical Anomalies in Administrative Law,*" Supreme Court Historical Soc'y. (1985). It may be more accurate to say that their concept of it was so different, we wouldn't recognize it as such.

Let us assume, *arguendo*, that World War II had been fought to a draw, and Joseph Mengele was not forced to flee from victors' justice. As his acts were those of the German government and, pre-

sumptively legal at the time, he would be immune from criminal prosecution. But were he to be sued in tort by a German soldier who was injected with mind-altering drugs against his will, or the woman he subjected to forced sterilization, one can only imagine the collective outrage the world would express, were he (and, the German government) able to hide behind the cloak of immunity.

These incidents actually happened, but not in post-war Germany. **They happened right here at home.** James Stanley, a master sergeant in the Army stationed at Fort Knox, was secretly administered doses of LSD, pursuant to an Army scheme to study its effects on humans. *United States v. Stanley*, 483 U.S. 669, 671 (1987). Linda Sparkman was sterilized without her consent or semblance of medical necessity, pursuant to an order from an Indiana Circuit Court judge. *Stump v. Sparkman*, 435 U.S. 349 (1978). In both instances, perpetrators of obvious crimes against humanity were allowed to take shelter behind a cloak of immunity.

B. Outcomes Under the Competing Theories of Sovereign Immunity

There are three basic forms of sovereign immunity from which the Framers could have selected. But they had to answer to a literate and uncommonly well-informed electorate, whose approval they needed to secure to give birth to their new

Republic. As such, this Court should not be asking what the Framers intended but rather, what their audience would have accepted. According to James Madison, the Stanley hypothetical was what the people were concerned with. 1 *Annals of Congress* 450 (Jun. 7, 1789) (statement of Rep. Madison) (people wanted traditional safeguards against abuse of power by the magistracy). Thus, it all comes down to a simple question: given the three choices, which approach toward immunity would the Framers have chosen?

1. Common Law Sovereign Immunity

Magna Carta established that the King was not a person but an office, one to be administered for the public good. Of course, he was a 'sovereign' and accordingly, nominally entitled to sovereign immunity, but if he wrongfully injured a subject in maladministration of that office, the barons were entitled to "distrain and distress [the King and his family] in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit." *Magna Carta* c. 61 (1215). In essence, while the King had "sovereign immunity," he only enjoyed it when doing something he was authorized by law to do.

Even a cursory review of English law at the time of the Revolution reveals that sovereign immunity

was a mere legal fiction. While the King could not be sued without his consent, he always consented when justice demanded it. *Marbury v. Madison*, 5 U.S. at 163. This permitted Blackstone to state with confidence that "it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* (citation omitted).

Under the common law, King Barack could do no wrong. However, he waived his immunity as a matter of course, and Sgt. Stanley would never be left without proper redress. Whereas 'the consent of the King' took shape through hundreds of years of custom and tradition, *see*, James Pfander, *Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 Nw. U.L. Rev. 899, 906-26 (1997), the Bill of Rights serves as an express and unequivocal waiver of immunity. It tells King Barack's officers that there are certain things they may not do. Hence, it is fair to conclude that they would have accepted this view of sovereignty.

2. Popular Sovereignty

In his influential *Commentaries*, Professor (Justice) Story explained what is historically the better view: popular sovereignty, wherein the sovereign people comprising the "State" divided its powers "among various functionaries, and each in the

limited sense would be sovereign in respect to the powers, confided to each; and dependent in all other cases. Strictly speaking, in our republican forms of government, the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state." 2 Joseph Story, *Commentaries On the Constitution of the United States* § 208 (1836).

Under this view, the people are the sovereign, whether it is here, in England, or Burkina Faso, and government is an agent of the people. Under this paradigm, when individual agents act outside the bounds of their agency, they enjoy no protection as the sovereign when they do.[5] Accordingly, the outcome is identical to that reached at common law, without the legal fiction of consent.

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[5] Blackstone explained the danger inherent in parliamentary sovereignty, 1 Blackstone, *Commentaries* at 157; the "American solution" was to repudiate it entirely, *see e.g.*, Thomas Jefferson, *A Summary View of the Rights of British America* (1774), reasoning that sovereignty resided in the people (who held it as tenants-in-common), and therefore, was impossible to delegate. See e.g., *Proclamation of the General Court* (Mass. 1776). It was incorporated in colonial constitutions, as well. *E.g.*, *Virginia Declaration of Rights* (Va. 1776); Mass. Const. (1780), Part I, art. V.).

3. "Saddam Hussein Immunity"

In recent years, a threadbare majority of this Court has read sovereign immunity in the Saddam Hussein sense, concluding that, because he was (they were) elected President of Iraq (appointed to the federal bench), any act he (they) takes is "an act of the people of Iraq" (the United States), heedless of whether the act in question was within the scope of their employment or, even expressly against the law. In essence, they claimed the *jus summi imperii* -- the absolute sovereignty of the despot. *Hans, supra; Stump, supra*. The trial court in Stump had a word for it: "tyranny." *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977).

This is the vision of "federalism," in the mind of Saddam Hussein, Justice Kennedy, and the Great Stalin: While every State is "bound" by the Constitution, the only cord which "binds" them is their own "good faith":

> The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. **The good faith of the States** thus **provides an important assurance** that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."

Alden v. Maine, 527 U.S. 706, 755 (1999) (emphasis added). Truly, a more elastic cord never has been devised. And to these honorable gentlemen, only three words need be offered in rebuttal:

"ARBEIT MACHT FREI"

When you stroll through the gates of Dachau on your way to the ovens, you are assaulted by that slogan, reminding you of the inherent *goodness* of Man. That five Justices would sign off on such a stultifying statement staggers the imagination. And that Clarence Thomas, descendant of slaves, would knowingly ascribe to it, eclipses all possible concepts of self-satire.

James Stanley was a soldier: a man who swore

to fight and die to defend a document so feeble, it could not even protect him from crimes against humanity. In turn, this begs the dispositive question in this case: **Would any sane human being, acting with knowledge that the Constitution had cloaked the new government in a impermeable shield of sovereign and judicial immunity, so "their betters" in Philadelphia could arbitrarily deprive them of their God-given rights at any time with absolute impunity, willingly consent to that arrangement?** To even state the case for the *Alden* line of cases is to refute it.

As Justice Stevens has pointed out, sovereign immunity is fundamentally unjust, as it empowers the State to deprive its citizens of their "rights" with absolute impunity. Stevens, *Two Questions* at 827-28. It has further been abolished as a matter of *jus cogens* international law. International Covenant on Civil and Political Rights ("ICCPR") art. 2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992) (signatory State must provide an effective remedy for rights violations committed by those acting in an official capacity); *see e.g., Maharaj v Attorney-General of Trinidad & Tobago (No. 2)*, A.C. 385 (1979) (rule throughout the Commonwealth); Case C-224/01, *Köbler v Austrian Republic*, 3 CMLR 28 (2003) (rule for European Union). Moreover, as Defendant United States is a signatory to the ICCPR, the Constitution declares that valid treaties are the Law of

the Land, U.S. Const. art. VI, cl. 2; *Head Money Cases*, 112 U.S. 580, 598-99 (1884), unilateral reservations which are fundamentally incompatible with the object and purpose of a treaty are void under international law, *see, Vienna Convention on the Law of Treaties*, art. 19, 1155 U.N.T.S. 331 (entered into force, Jan. 27, 1980); and "an act of congress ought never be construed to violate the law of nations, if any other possible construction remains," *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quotation omitted), it is hard to imagine any form of legitimate judicial alchemy that could deprive this treaty of legal force.

If this Court's duty is to give life to the intent of the Framers, it has little choice but to abandon its previous decisions. *Stare decisis* is not a straightjacket, but a corset. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 855 (1992). As this Court has laid waste to a healthy cache of precedents, *e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986); *Stanford v. Kentucky*, 492 U.S. 361 (1989), on the basis of perceived "errors," this Court ought to take the opportunity to inter a doctrine that has produced nothing but manifest injustice. **You owe that to the memory of James Stanley.**

CONCLUSION

What is the Constitution, but the great contract of the people? Judge Roane asked that question in *Kamper*, 3 Va. at 59, and it is just as fair to ask it today. Stripped of the mysticism and patriotism, it is a series of adhesion contracts, creating express and limited agencies, and colloquially described as "citizenship" and "statehood."

Under the terms of this contract, citizens agree to pay taxes, to obey the laws, and to fight and even lay down our lives, if necessary, to preserve the Republic. We citizens don't ask that much in return, but what we do ask, we have the right to demand. According to Justice Alito, we have a right to **DEMAND** "evenhanded enforcement of the law." *Ricci v. DeStefano*, No. 07-1428, 557 U.S. ___ (2009) (Alito, J., concurring; slip op., at 13). Or, in the elegant prose of Chief Justice Marshall, the right to claim the protection of the laws whenever he receives an injury. **Smith DEMANDS the same Fourteenth Amendment Hugh Caperton got, the same *Rooker-Feldman* doctrine Exxon-Mobil got, and the same Equal Protection Clause Frank Ricci got.**

That justices of the Colorado Supreme Court committed a tort and federal felony (specifically, honest services mail fraud) against Smith cannot reasonably be disputed, as every fact necessary

to prove that claim has been judicially noticed. The only question is whether this Court will treat it as the unauthorized abuse of power that it is, or require the General Government to ratify the act and compensate Smith for the ensuing harm. **To do nothing is to sign our Republic's death certificate.** Accordingly, this Court should grant a writ of certiorari, to resolve the issues of broad significance raised by this petition.

Respectfully submitted,

__/s/_____
Kenneth L. Smith, *pro se*
23636 Genesee Village Rd.
Golden, Colorado 80401
Tel: (303) 526-5451

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,958 words,[6] excluding parts of the document exempted by Supreme Court Rule 33.1(d), and that the text is set in the Century family (Century Gothic).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2010.

_/s/_____
Kenneth L. Smith, *in propria persona*

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[6] This tally includes the 29 words in the cartoon and photograph and 37, in the statement of jurisdiction.

Smith v. Bender, No. 09-1003 (10th Cir. 09/11/2009)

[1] UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[2] No. 09-1003

[3] 2009.C10.0001077< http://www.versuslaw.com>

[4] September 11, 2009

[5] KENNETH L. SMITH, PLAINTIFF-APPELLANT,
v.
MICHAEL L. BENDER; NATHAN B. COATS; GREGORY J. HOBBS, JR.; REBECCA LOVE KOURLIS; ALEX J. MARTINEZ; NANCY E. RICE; MARY J. MULLARKEY; JOHN W. SUTHERS; FRIEDRICK C. HAINES; JOHN DOES 1-99; THE UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES.

[6] (D.C. No. 1:07-CV-01924-MSK-KMT) (D. Colo.).

[7] The opinion of the court was delivered by: John C. Porfilio Circuit Judge

[8] ORDER AND JUDGMENT*fn1

[9] Before TACHA, PORFILIO, and ANDERSON, Circuit Judges.

[10] Kenneth L. Smith, proceeding pro se, appeals from the district court's opinion and final order dismissing his claims against the above-named defendants and denying his motion to recuse the district judge. Exercising jurisdiction under 28 U.S.C. § 1291, and having reviewed the district court's rulings de novo, we affirm.

[11] I.

[12] We begin by commending the district judge for her thorough and detailed work in this case, and hereby adopt the following background statement from her opinion and final order:

[13] According to the original pro se Complaint . . . , the Plaintiff was a litigant in the case of Smith v. Mullarkey, Denver District Court Case No. 02-cv-127. In that case, the Plaintiff alleged claims under 42 U.S.C. § 1983, among others, relating to the denial of his admission to the bar of the State of Colorado. The Denver District Court dismissed the Plaintiff's case, ostensibly on the grounds that the Colorado Supreme Court has the exclusive jurisdiction over matters involving the licensing of persons to practice law. The Plaintiff filed a timely appeal of the dismissal to the Colorado Court of Appeals, but on August 16, 2005, the Court of Appeals found that it lacked jurisdiction over the

case-presumably for the same reason stated by the District Court-and transferred the case to the Colorado Supreme Court pursuant to C.R.S. § 13-4-110(1)(a). Although each of the Justices of the Colorado Supreme Court were named as parties in the case (apparently due to their oversight of the attorney admissions process to which the Plaintiff objected), it found that "[b]y operation of the Rule of Necessity, [Colorado Code of Judicial Conduct,] Canon 3F," the court could nevertheless hear the matter. Smith v. Mullarkey, 121 P.3d 890, 891 n.1 (Colo. 2005). In that same order, the Court affirmed the decision of the District Court on its merits. Id. at 892.

[14] The Complaint . . . in this action [was filed against the seven Justices of the Colorado Supreme Court, the Attorney General and an Assistant Attorney General of the State of Colorado, and the United States, and it] expressly states four causes of action [relating to Smith v. Mullarkey]: (i) a claim pursuant to 42 U.S.C. § 1983 that each of the Defendants violated [the Plaintiff's] constitutional rights under [the] Due Process and Equal Protection clauses; (ii) a claim captioned as one for "denial of access to the courts," but which appears to assert a civil conspiracy among the Defendants, as a result of which the Plaintiff was injured because . . . he was unable to obtain the relief he sought in Smith v. Mullarkey; (iii) a claim for "supervisory liability,"

apparently asserted only against Defendant Suthers (who, as Attorney General of the State of Colorado, appeared on behalf of the defendants in Smith v. Mullarkey and allegedly oversaw the actions of Defendant Haines, the Assistant Attorney General who actually defended the case) because he failed to take effective remedial action to prevent Defendant Haines from engaging in a constitutional violation; and (iv) a claim against the United States, alleging that it has failed to provide the Plaintiff with a remedy for his grievances, thereby violating treaty obligations created by the International Covenant on Civil and Political Rights ("ICCPR"). The Plaintiff seeks money damages and unspecified injunctive relief.

[15] On February 6, 2008, the Plaintiff filed a pro se Amended Complaint. . . . The Amended Complaint does not appear to modify any of the first three claims asserted by the Plaintiff, but elaborates substantially on the basis for the Plaintiff's fourth claim under the ICCPR. As best the Court can determine, the Plaintiff alleges that the conduct violating his rights under the ICCPR include[s]: an alleged criminal conspiracy, involving both the Defendants here and other non-party judges of the District of Colorado and the 10th Circuit Court of Appeals, to violate the Plaintiff's constitutional rights; the failure of non-party judges of the District of Colorado and 10th

Circuit Court of Appeals to follow controlling Supreme Court precedent when adjudicating cases brought by the Plaintiff; and the "Systemic Discrimination Against Pro Se Litigants," . . . . The Amended Complaint also adds a new claim for relief, which purports to seek "declaratory and/or injunctive relief, as appropriate," but which cites only to the Declaratory Judgment Act, 28 U.S.C. § 2201, and requests "an appropriate declaration of his rights under the Bill of Rights and/or the [ICCPR]."

[16] The Plaintiff filed a Motion to Recuse . . . . In this motion, he argues that the undersigned is also adjudicating another case in which he is the plaintiff and the "United States District Court for the District of Colorado" is named as a defendant, Smith v. Ebel, D.C. Colo. Case No. 08-cv-00251-MSK-KMT. According to the Motion to Recuse, the relief sought in Smith v. Ebel is an "injunction compelling [District of Colorado] judges who handle this case to adhere to a minimum standard of conduct," and that "For this Court to issue such injunctive relief, it would have to issue that injunction to itself . . . and would logically warrant this Court's recusal in this matter."

[17] Smith v. Bender, 2008 WL 2751346 at *1, *3-4 (D. Colo. July 11, 2008) (unpublished) (additional alterations added to original).

[18] II.

[19] In response to motions filed by defendants, the district judge dismissed all of Mr. Smith's claims with prejudice in a lengthy and extremely well-reasoned opinion and final order. First, the judge determined that the doctrine of sovereign immunity deprived the district court of subject matter jurisdiction over Mr. Smith's claims against the United States under the ICCPR. Id. at *6-7. Second, because the relief Mr. Smith was seeking in this case could only be granted by upsetting the Colorado Supreme Court's decision in Smith v. Mullarkey, the judge determined that the Rooker-Feldman doctrine deprived the district court of subject matter jurisdiction over Mr. Smith's claims against the named Justices of the Colorado Supreme Court.*fn2 Id. at *8. Third, the judge determined that the doctrine of qualified immunity barred Mr. Smith's claims against defendants Suthers and Haines. Id. at *11-14. In the same order, after thoroughly analyzing the issue, id. at *4-6, the district judge also denied Mr. Smith's recusal motion, finding "no grounds to warrant recusal under [28 U.S.C.] § 455 in this case," id. at *5. Because Mr. Smith has utterly failed to convince us that any of the district judge's rulings are erroneous, we affirm the dismissal of Mr. Smith's claims and the denial of his recusal motion for the reasons set forth in the district judge's opinion and final order.*fn3

[20] In order to fully address the issues raised by Mr. Smith in this appeal, however, we also point out the following fallacies in his arguments. First, to the extent Mr. Smith is seeking to relitigate his federal-law challenges to the Colorado Supreme Court's denial of his admission to the bar of the State of Colorado, those challenges are barred by the doctrines of res judicata and collateral estoppel by virtue of: (1) this court's final decision in Mr. Smith's prior appeal to this court, see Smith v. Mullarkey, 67 F. App'x 535, 538 (10th Cir. 2003) (applying Rooker-Feldman doctrine and holding that district court correctly determined that it did not have subject matter jurisdiction over Mr. Smith's federal-law claims challenging the denial of his admission to the Colorado bar); and (2) the fact that the United States Supreme Court denied Mr. Smith's petition for a writ of mandamus and/or prohibition pertaining to that final decision, see In re Smith, 540 U.S. 1103 (2004).

[21] Second, the Rooker-Feldman doctrine bars Mr. Smith from relitigating the refusal of the Justices of the Colorado Supreme Court to recuse from his appeal in Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005). See Fieger v. Ferry, 471 F.3d 637, 644 (6th Cir. 2006) (holding that Rooker-Feldman doctrine barred subject matter jurisdiction over attorney's declaratory judgment claim to extent it sought declaration that Michigan Supreme Court

Justices' refusal to recuse themselves in his past cases violated his due process rights).*fn4 Because the recusal issue was inextricably intertwined with the state-court judgment, Mr. Smith's only available avenue for relief was to seek certiorari review in the United States Supreme Court. See 28 U.S.C. § 1257. Indeed, we note that Mr. Smith sought such certiorari review of the recusal issue, see 2005 WL 3785452 at *5-11, but the Supreme Court denied his certiorari petition, see Smith v. Mullarkey, 547 U.S. 1071 (2006).

[22] Third, the Supreme Court's recent decision in Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252, 2256-57 (2009) (holding that state-court-appellate judge should have recused himself from appeal as matter of due process) is of no assistance to Mr. Smith on the recusal issue. Importantly, Caperton was before the Court on a petition for a writ of certiorari to review a decision of the West Virginia Supreme Court of Appeals in a civil case brought in state court. Id. at 2257-59. Thus, while Caperton demonstrates the proper way for a state-court loser to raise federal-law challenges to a state-court judge's refusal to recuse, it has no other applicability to this case.

[23] Fourth, in the section of his opening brief entitled "Summary Of The Argument," Mr. Smith claims that, in Smith v. Mullarkey, the Justices of the Colorado Supreme Court "violated his well-

established federal right to have [his] federal civil rights claims and/or facial challenges to a [state] statute grounded in federal law decided in a state court of general jurisdiction." Aplt. Opening Br. at 15 (citing Claflin v. Houseman, 93 U.S. 130 (1876)). Mr. Smith further argues that "[t]his constitutes an 'independent claim,' which has always been outside the ambit of the Rooker-Feldman doctrine." Id. (citing Kenmen Eng'g v. City of Union, 314 F.3d 468, 479-80 (10th Cir. 2002)). This is the only reference to this claim in Mr. Smith's opening brief, however, as it is omitted from the preceding sections in the brief, and Mr. Smith likewise did not address it in the "Argument," "Conclusion," or "Statement Regarding Oral Argument" sections of the brief.*fn5 Id. at 17-67. Despite his pro se status, we easily conclude that Mr. Smith has failed to adequately brief this claim, and we therefore decline to address it. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived[.]"). Further, while we still may possess discretion to consider this claim, we refuse to exercise such discretion in favor of Mr. Smith given, as set forth below, the blatant disrespect for the judicial process that he has demonstrated in this appeal. Cf. Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840, 841 (10th Cir. 2005) (refusing "to delve for substance in a pro se pleading" where the plaintiff's appellate briefs were written in a "scurrilous tone" and did

"little more than attempt to impugn (without basis) the integrity of the district judge").

[24] Fifth, we note that Mr. Smith has raised new allegations in this appeal regarding the district judge's alleged personal relationships with two Justices of the Colorado Supreme Court. Even if appropriately raised for the first time on appeal, an issue we do not need to decide, these new allegations do not support recusal of the district judge because they are based on pure speculation.

[25] Specifically, the only thing Mr. Smith appears to know for sure is that: (1) the district judge's husband was a college classmate of Justice Hobbs and the two worked at the same college radio station, see Aplt. Opening Br. at 51; and (2) the district judge and Chief Justice Mullarkey hosted a luncheon together for the National Association of Women Judges in May 2008, id. at 49-50. These meager allegations do not come close to establishing a basis for recusal under 28 U.S.C. § 455(a) or (b), and the spurious inferences that Mr. Smith draws from them are nothing but speculative guesswork. See, e.g., Aplt. Opening Br. at 51-52 ("Notre Dame is widely reputed as having one of the most effective alumni networks in the country, and it beggars the imagination to suggest that the two "Golden Domers" who shared an eclectic hobby, lived in

the same city, and traveled in the same social circles would not have maintained a close personal friendship."); id. at 51 ("[O]rganizing presentations like the one [the district judge] and Justice Mullarkey put on . . . falls to the member judges who are putting it on, and doing so commands substantial effort. . . . Simply put, it is not the kind of project you normally collaborate on with your worst enemy.").

[26] Finally, we note that Mr. Smith's opening and reply briefs are littered with frivolous and irrelevant arguments and tirades. His briefs also contain scurrilous allegations and personal attacks regarding alleged wrongdoing by the named Justices of the Colorado Supreme Court and the district judge. See, e.g., id. at 45 ("[T]he Defendant Justices were free to take several courses of action that would not have earned them a reservation in Leavenworth."); id. at 61 ("Next in order of severity is misprision of felony (18 U.S.C. § 4), the provision used in this Circuit to ensnare Timothy McVeigh confederate Terry Nichols. All [the district judge] had to 'know' is that her friends [on the Colorado Supreme Court] committed a felony -- which, given the facts she judicially noticed, is difficult to ignore -- and her failure to take action entitles her to three years in Club Fed."); id. at 59-60 ("[The district judge] should have had the legal acumen to recognize that, by using her good offices to help her

husband's old college chum get out of a pickle, she was making her own personal reservation for a extended visit to Leavenworth."); id. at 60 ("By any objective measure, [the district judge] has bought herself a rather large and juicy slab of criminal liability."). We admonish and warn Mr. Smith that if he files future appeals in this court containing similar unsupported claims, allegations, or personal attacks, we will not hesitate to impose hefty sanctions and filing restrictions in order to curb his abusive and disrespectful litigation practices.

[27] The district court's opinion and final order is AFFIRMED.

Opinion Footnotes

[28] *fn1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[29] *fn2 "The Rooker-Feldman doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by state-court losers challenging state-court judgments rendered before the district court proceedings commenced." Mann v. Boatright, 477 F.3d 1140, 1145 (10th Cir. 2007) (quotations omitted).

[30] *fn3 We also note that Mr. Smith has failed to challenge the dismissal of his claims against defendants Suthers and Haines in his opening brief. Those claims are therefore deemed abandoned or waived. See Coleman v. B-G Maint. Mgmt. of Colorado, Inc., 108 F.3d 1199, 1205 (10th Cir. 1997).

[31] *fn4 Although the Rooker-Feldman doctrine would not bar a general constitutional challenge to Colorado's recusal statutes or rules as applied in future cases, see Fieger, 471 F.3d at 644-46, Mr. Smith has not asserted such a challenge in this case.

[32] *fn5 We also note that Mr. Smith failed to make any specific arguments pertaining to this claim in the reply brief that he submitted to this court. Instead, his only reference to the claim is a conclusory, and unsupported, statement that the "courts" within the Tenth Circuit have "defied" the Supreme Court's decision in Claflin "re: availability

of state courts to vindicate federal claims." Aplt. Reply Br. at 24, 25.

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Smith v. Bender, No. 07-cv-01924-MSK-KMT (D.Colo. 07/11/2008)

[1] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[2] Civil Action No. 07-cv-01924-MSK-KMT

[3] 2008.DCO.0002771< http://www.versuslaw.com>

[4] July 11, 2008

[5] KENNETH L. SMITH PLAINTIFF,
v.
MICHAEL L. BENDER, NATHAN B. COATS, GREGORY J. HOBBS, JR., REBECCA LOVE KOURLIS, ALEX J. MARTINEZ, NANCY E. RICE, MARY J. MULLARKEY, JOHN W. SUTHERS, FREDRICK C. HAINES, JOHN DOES 1-99, AND THE UNITED STATES OF AMERICA, DEFENDANTS.

[6] The opinion of the court was delivered by: Honorable Marcia S. Krieger

[7] OPINION AND FINAL ORDER GRANTING MOTIONS TO DISMISS AND DISMISSING CLAIMS WITH PREJUDICE

[8] THIS MATTER comes before the Court pursuant to Defendant United States of America's

Motion to Dismiss (# 6), the Plaintiff's response (# 13), and the United States' reply (# 25); Defendants Rice, Bender, Coats, Hobbs, Kourlis, Martinez, Mullarkey (collectively, the "Supreme Court Defendants"), Haines, and Suthers' (collectively, with the Supreme Court Defendants, the "State Defendants") Motion to Dismiss (# 7), the Plaintiff's response (# 14), and the State Defendants' reply (# 31); the Plaintiff's Motion for Declaratory Relief (# 12), Defendant United States' response (# 16), and the Plaintiff's reply (# 17, 21); the Plaintiff's Motion for Injunctive Relief (# 18), Defendant United States' response (# 27), the State Defendants' response (# 36), and the Plaintiff's reply (# 33, 45); the Plaintiff's Motion for Relief Pursuant to 28 U.S.C. § 292 (# 19), Defendant United States' response (# 28), and the State Defendants' response (# 34); the Plaintiff's Motion for the Taking of Judicial Notice (# 20), Defendant United States' response (# 26), the State Defendants' response (# 35), and the Plaintiff's reply (# 44); Defendant United States' Motion to Dismiss for Lack of Jurisdiction (#37), and the Plaintiff's response*fn1 (# 46); the State Defendants' Motion to Dismiss for Lack of Jurisdiction (# 39), the Plaintiff's response (# 48, 49), and the State Defendants' reply (# 52); and the Plaintiff's Motion for Recusal (# 43), Defendant United States' response (# 47), and the Plaintiff's reply (# 51).

[9] BACKGROUND

[10] According to the original pro se Complaint (# 1), the Plaintiff was a litigant in the case of Smith v. Mullarkey, Denver District Court Case No. 02-cv-127. In that case, the Plaintiff alleged claims under 42 U.S.C. § 1983, among others, relating to the denial of his admission to the bar of the State of Colorado. The Denver District Court dismissed the Plaintiff's case, ostensibly on the grounds that the Colorado Supreme Court has the exclusive jurisdiction over matters involving the licensing of persons to practice law. The Plaintiff filed a timely appeal of the dismissal to the Colorado Court of Appeals, but on August 16, 2005, the Court of Appeals found that it lacked jurisdiction over the case -- presumably for the same reason stated by the District Court -- and transferred the case to the Colorado Supreme Court pursuant to C.R.S. § 13-4-110(1)(a). Although each of the Justices of the Colorado Supreme Court were named as parties in the case (apparently due to their oversight of the attorney admissions process to which the Plaintiff objected), it found that "[b]y operation of the Rule of Necessity, Canon 3F," the court could nevertheless hear the matter. Smith v. Mullarkey, 121 P.3d 890, 891 n. 1 (Colo. 2005). In that same order, the Court affirmed the decision of the District Court on its merits. Id. at 892.

[11] The Complaint (# 1) in this action expressly

states four causes of action: (i) a claim pursuant to 42 U.S.C. § 1983 that each of the Defendants violated his constitutional rights under Due Process and Equal Protection clauses; (ii) a claim captioned as one for "denial of access to the courts," but which appears to assert a civil conspiracy among the Defendants, as a result of which the Plaintiff was injured because as he was unable to obtain the relief he sought in Smith v. Mullarkey; (iii) a claim for "supervisory liability," apparently asserted only against Defendant Suthers (who, as Attorney General of the State of Colorado, appeared on behalf of the defendants in Smith v. Mullarkey and allegedly oversaw the actions of Defendant Haines, the Assistant Attorney General who actually defended the case) because he failed to take effective remedial action to prevent Defendant Haines from engaging in a constitutional violation; and (iv) a claim against the United States, alleging that it has failed to provide the Plaintiff with a remedy for his grievances, thereby violating treaty obligations created by the International Covenant on Civil and Political Rights ("ICCPR"). The Plaintiff seeks money damages and unspecified injunctive relief.

[12] Both the United States (# 6) and the State Defendants (# 7) move to dismiss the Complaint. The United States' motion argues: (i) that the Court lacks subject matter jurisdiction because the

Plaintiff has not identified an applicable waiver of sovereign immunity; (ii) that the Court lacks subject matter jurisdiction because the Plaintiff's claims present a non-justiciable political question; (iii) that the doctrine of jus cogens*fn2 does not create jurisdiction over the Plaintiff's claims; and (iv) that the Plaintiff fails to state a claim upon which relief may be granted.

[13] The State Defendants' motion raises six arguments: (i) that the Court lacks subject matter jurisdiction over the Plaintiff's claims because the claims are barred by the Rooker-Feldman doctrine; (ii) that the claims against the Colorado Supreme Court Justices are barred as a result of absolute judicial immunity; (iii) that Defendants Suthers and Haines are entitled to qualified immunity, in that the Plaintiff fails to adequately allege a constitutional violation or show that such a right was clearly established at the time of the alleged violation; (iv) that Plaintiff fails to state a claim against Defendant Haines because the Complaint fails to allege Defendant Haines' personal participation in any constitutional deprivation; (v) that the third claim, asserted against Defendant Suthers, alleges only vicarious liability and thus, fails to state a claim; and (vi) that the claims are barred by the statute of limitations.

[14] The Plaintiff filed a Motion for Declaratory

Relief (# 12), which appears to either be a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) or a motion for summary judgment pursuant to Fed. R. Civ. P. 56, as to the ICCPR claim. The Plaintiff argues that the he has standing to bring a claim under the ICCPR, that the United States' contention that it does consider the ICCPR to be self-executing is inconsistent with, and thus severable from, the treaty's terms; and that the treaty waives the United States' sovereign immunity. It is not clear whether the Plaintiffs' motion seeks relief in the form of a judgment in his favor on his ICCPR claim, or seeks an alternative remedy -- namely, that the Court declare that "the United States in in violation of international law," such that he could then seek legislative relief. Docket # 12 at 16.

[15] Separately, the Plaintiff filed a Motion for Injunctive and/or Declaratory Relief (# 18). This motion appears to request relief in the form of a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). The Plaintiff does not specify the terms of the injunction he seeks, but the Motion appears to seek two forms of injunctive relief: (i) an order "requiring Chief Justice Mullarkey to appoint judges of the Colorado Court of Appeals to the [Colorado Supreme Court] for purposes of deciding the matter of jurisdiction over his appeal pursuant to C.R.S. § 13-4-110"; and (ii) an order "requiring Ms. Mullarkey to issue an opinion

retracting the original opinion issued in Smith v. Mullarkey, supra., and explain why it is being retracted." Docket # 18 at 11. The Plaintiffs' Motion argues that he can establish each of the four traditional elements required to obtain injunctive relief.

[16] The Plaintiff also moves for relief pursuant to 28 U.S.C. § 292 (# 19). The precise nature of this motion is somewhat difficult to discern. To some extent, it does not appear that this motion is specifically directed to this case; it appears to suggest that this Court "may be called upon to opine not only on the propriety of the conduct of the Chief Judge of this District and several members of the Court of Appeals for the Tenth Circuit," even though these individuals are not parties to this action, are not referenced in the Complaint, and otherwise have no alleged involvement with this case whatsoever. The remainder of the motion is equally unclear: the Plaintiff extensively recites generalized criticism as to the judicial system as a whole; alleges that meaningful appellate review is unavailable; accuses unspecified "federal judges" of engaging in criminal deprivation of constitutional rights; and contends that "this District" is "waging a war against pro se litigants." The Motion appears to request the recusal of "every judge in this District (or for that matter, in this Circuit) with regard to this case" and that "this case should be transferred out

of the District." Docket # 19 at 19. As alternative relief, the Plaintiff requests that "all judges with conflicts recuse themselves." Id.

[17] The Plaintiff also moves (# 20) for this Court to take judicial notice under Fed. R. Evid. 201, of the following facts: (i) the provisions of C.R.S. § 16-6-201; (ii) the Colorado Supreme Court's published opinion in Smith v. Mullarkey; (iii) the provisions of C.R.S. § 13-4-101; (iv) Canon 3 of the Colorado Code of Judicial Conduct; (v) the provisions of C.R.S. § 13-4-102(1); (vi) that date of the Plaintiff's Notice of Appeal to the Colorado Court of Appeals in Smith v. Mullarkey; (vii) the contents of that Notice of Appeal; (viii) the provisions of C.R.S. § 13-4-110(1)(a); (ix) the August 16, 2005 Order of the Colorado Court of Appeals transferring the case to the Colorado Supreme Court, and the August 18, 2005 Order of the Supreme Court accepting the transfer; (x) the Plaintiff's Amended Complaint in the Smith v. Mullarkey case; and (xi) the June 30, 1999 Report of the Attorney Admissions Hearing Panel recommending that the Plaintiff's application to the Bar of Colorado be denied. Interspersed with the requests for the taking of judicial notice are arguments by the Plaintiff as to the significance that should be afforded each document.

[18] On February 6, 2008, the Plaintiff filed a pro se Amended Complaint (# 32). The Amended

Complaint does not appear to modify any of the first three claims asserted by the Plaintiff, but elaborates substantially on the basis for the Plaintiff's fourth claim under the ICCPR. As best the Court can determine, the Plaintiff alleges that the conduct violating his rights under the ICCPR include: an alleged criminal conspiracy, involving both the Defendants here and other non-party judges of the District of Colorado and the 10th Circuit Court of Appeals, to violate the Plaintiff's constitutional rights; the failure of non-party judges of the District of Colorado and 10th Circuit Court of Appeals to follow controlling Supreme Court precedent when adjudicating cases brought by the Plaintiff; and the "Systemic Discrimination Against Pro Se Litigants," similar to that addressed by the Plaintiff in Docket # 19. The Amended Complaint also adds a new claim for relief, which purports to seek "declaratory and/or injunctive relief, as appropriate," but which cites only to the Declaratory Judgment Act, 28 U.S.C. § 2201, and requests "an appropriate declaration of his rights under the Bill of Rights and/or the [ICCPR]."

[19] The United States moved to dismiss (# 37) the Amended Complaint, alleging essentially the same arguments as in its prior Motion to Dismiss. The State Defendants moved to dismiss (#39) the Amended Complaint, raising effectively identical arguments to those presented in their earlier motion.

[20] The Plaintiff filed a Motion to Recuse (# 43). In this motion, he argues that the undersigned is also adjudicating another case in which he is the plaintiff and the "United States District Court for the District of Colorado" is named as a defendant, Smith v. Ebel, D.C. Colo. Case No. 08-cv-00251-MSK-KMT. According to the Motion to Recuse, the relief sought in Smith v. Ebel is an "injunction compelling [District of Colorado] judges who handle this case to adhere to a minimum standard of conduct," and that "For this Court to issue such injunctive relief, it would have to issue that injunction to itself. . . and would logically warrant this Court's recusal in this matter."

[21] ANALYSIS

[22] A. Standard of Review

[23] Because the Plaintiff appears pro se, the Court construes his pleadings liberally.*fn3 Haines v. Kerner, 404 U.S. 519, 520-21 (1972). However, such liberal construction is intended merely to overlook technical formatting errors and other defects in the Plaintiff's use of legal terminology and proper English. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Pro se status does not relieve the Plaintiff of the duty to comply with the various rules and procedures governing litigants and counsel or the requirements of the substantive

law, and in these regards, the Court will treat the Plaintiff according to the same standard as counsel licensed to practice law before the bar of this Court. See McNeil v. U.S., 508 U.S. 106, 113 (1993); Ogden v. San Juan County, 32 F.3d 452, 455 (10th Cir. 1994).

[24] B. Motion to Recuse/Motion for Relief Under 28 U.S.C. § 292

[25] Logically, the Court must first consider the Plaintiff's motion requesting that the undersigned recuse from the case. 28 U.S.C. § 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The inquiry to be made in such a circumstances is "whether a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge of his interest or bias in the case." Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., 535 U.S. 229, 232-33 (2002) (emphasis in original). The fact that a judge may have formed opinions based on facts asserted or events occurring in other proceedings does not constitute grounds for recusal, except where the judge displays deep-seated favoritism or antagonism that would make fair judgment impossible. U.S. v. DeClerck, 252 Fed.Appx. 220, 223 (10th Cir. 2007) (unpublished), quoting Liteky v. U.S., 510 U.S. 540, 555 (1994).

Similarly, a judge is necessarily required to faithfully perform the duties of the office. Such performance may often take the form of unfavorable rulings against a particular litigant, or even referrals of an attorney to disciplinary authorities for review; in the absence of a particularized showing of bias or prejudice, the discharge of these kinds of duties does not arise to grounds for recusal. U.S. v. Mendoza, 468 F.3d 1256, 1262 (10th Cir. 2006); see also Liteky, 510 U.S. at 555 ("judicial rulings alone almost never constitute a valid basis for bias." Unsubstantiated suggestions, speculations, and opinions of a litigant that bias exists is insufficient to warrant recusal; indeed, a judge "has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse the law and facts require." Carpenter v. Boeing Co., 456 F.3d 1183, 1204 (10th Cir. 2006).

[26] The Plaintiffs' Motion to Recuse, on its face, does not assert that the undersigned holds any personal bias, or otherwise cites to facts that allegedly compromise the undersigned's ability to objectively adjudicate the claims in this action. Rather, the Plaintiff points to the fact that (until recently), the undersigned was also the presiding judge in Smith v. Ebel, D.C. Colo. Case No. 08-cv-00251-MSK-KMT, an entirely distinct case in which the Plaintiff has sued, among others, the 10th Circuit Court of Appeals, the United States District

Court for the District of Colorado, the Colorado Supreme Court, and the Colorado Court of Appeals, each court having been simply named as a collective entity. In that case, the Plaintiff complained of, among other things, courts' issuance of "non-precedential" unpublished opinions, "systemic discrimination" against pro se litigants, and judges "knowingly misapply[ing] binding precedent." As relief in Smith v. Ebel, the Plaintiff sought injunctive relief from this Court, prohibiting the named defendant courts from engaging in the challenged practices. The instant Motion to Recuse in this case notes the undersigned's assignment to preside over Smith v. Ebel; notes that, were the Court to grant the relief sought in that case, the undersigned "would have to issue that injunction to itself and be responsible for policing its compliance with its own order"; and thus, argues that the situation "would logically warrant [the undersigned]'s recusal in this matter."

[27] On its face, the Plaintiffs' argument for recusal is without merit. The fact that the Plaintiff has requested paradoxical relief in another action is of no significance in this case. The claims and relief sought here are discrete from the claims and relief sought in Smith v. Ebel, such that any grounds for recusal that might exist in Smith v. Ebel do not exist here. Curiously, the Plaintiff makes no argument that recusal is warranted here based on the particular claims asserted or relief sought in

this case. Accordingly, the undersigned finds no grounds to warrant recusal under § 455 in this case.

[28] There have recently been developments in the Smith v. Ebel case that warrant brief comment, but which do not change the outcome here. In late May 2008, the Plaintiff filed an Amended Complaint in Smith v. Ebel that, for the first time, specifically named the undersigned as a defendant, ostensibly "in her official capacity as Judge." By order dated June 27, 2008, the undersigned recused in that case, noting that although recusal was not necessarily warranted under § 455(a), Switzer v. Berry, 198 F.3d 1255, 1257-58 (10th Cir. 2000) ("the statute is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice"), recusal was warranted because the undersigned had been rendered a witness in the case by virtue of a dispute over the sufficiency of service. Based on the reasoning of Switzer, the Court finds that the Plaintiff's indiscriminate, potentially frivolous, attempt to name the undersigned as a party in Smith v. Ebel - apparently for the sole purpose of forcing recusal - does not amount to a circumstance in which a reasonable person, with full knowledge of the circumstances, would have cause to question the undersigned's impartiality with respect to the allegations in this case. See also Smith v. United

States Court of Appeals, 484 F.3d 1281, 1283 n. 1 (10th Cir. 2007) (absent "pertinent, particularized allegations of bias," naming of judge as party is insufficient to disqualify judge from hearing case). Nor does the undersigned's decision to recuse in Smith v. Ebel - a recusal focusing on the fact that the undersigned had been rendered a witness on a disputed fact in that case - warrant a logical inference that recusal is also warranted here.

[29] Accordingly, the Plaintiff's Motion for Recusal is denied. For the same reasons, the Plaintiff's Motion for Relief Pursuant to 28 U.S.C. § 292, to the extent it can reasonably be understood to request recusal of the undersigned, is denied.

[30] C. Motions to Dismiss for Lack of Subject Matter Jurisdiction/Motion to Take Judicial Notice

[31] Next, the Court must consider the motions challenging the sufficiency of subject-matter jurisdiction in this case.

[32] The party asserting the existence of subject matter jurisdiction- in this case, the Plaintiff- bears the burden of proving that such jurisdiction exists. Montoya v. Chao, 269 F.3d 952, 955 (10th Cir. 2002). A Fed R. Civ. P. 12(b)(1) challenge to the sufficiency of subject matter jurisdiction generally takes one of two forms: (1) a facial attack on the

sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based. Ruiz v. McDonnell, 299 F.3d 1173, 1180 (10th Cir. 2002), citing Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir.1995). Here, the parties do not appear to dispute the accuracy of the facts alleged by the Plaintiff to the procedural history of the Smith v. Mullarkey case, nor the existence of certain cited Colorado statutes. To the extent that it is necessary for purposes of this decision, the Court grants the Plaintiff's Motion To Take Judicial Notice with regard to the various orders entered in that action, as well as of the statutes the Plaintiff relies upon. (The Court disregards the Plaintiffs' characterizations of those orders and statutes in his motion, because the orders and statutes speak for themselves.)

[33] 1. Defendant United States' claim of sovereign immunity

[34] Defendant United States argues that the Court lacks subject matter jurisdiction to consider the claims against it because the Plaintiff cannot demonstrate a waiver of the United States' sovereign immunity. The Plaintiff invokes 28 U.S.C. § 1331 as the basis for his claim of federal subject matter jurisdiction, arguing that his claims against the United States "aris[e] under the Constitution,

laws or treaties of the United States." However, § 1331 will only confer subject matter jurisdiction on this Court where some other authority explicitly waives the United States' sovereign immunity. High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1181 (10th Cir. 2006); Harrell v. U.S., 443 F.3d 1231, 1234 (10th Cir. 2006) ("absent express waiver of sovereign immunity, federal courts lack subject matter jurisdiction over suits against the United States).

[35] The Plaintiff contends that the ICCPR is, itself, a waiver of the United States' sovereign immunity. Greatly summarized, the Plaintiff's argument on this point is that, under principles of international law, the U.S. is prohibited from invoking its own internal law to avoid its obligations under the ICCPR, and thus, cannot rely upon principles of sovereign immunity to avoid suits invoking the ICCPR's protections.

[36] The United States ratified the ICCPR in 1992, but did so under an express reservation that the provisions of the treaty "are not self-executing." See generally Ralk v. Lincoln County, 81 F.Supp.2d 1372, 1380 (N.D. Ga. 2000) (discussing history of ICCPA). The express purpose of the reservation was "to clarify that the Covenant will not create a private cause of action in the U.S. courts." Id., citing Senate Committee on Foreign Relations Report on the International Covenant on Civil and

Political Rights, 31 I.L.M. 645, 652 (1992). Dozens of courts, including the 10th Circuit, have found that, due to either the reservation, the ICCPR's non-self executing nature or both, the treaty does not authorize a private right of action. Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002) ("Even if . . . the above-quoted reservation were void . . . it is clear that the ICCPR is not biding on the federal courts"); see also Leombruno v. Craven, 2007 WL 2265119 (D. Id. 2007) (unpublished); Clancy v. Office of Foreign Assets Control, 2007 WL 1051767 (E.D. Wis. 2007) (unpublished); Martinez-Lopez v. Gonzales, 454 F.3d 500, 502 (5th Cir. 2006); Brightwell v. Lehman, 2006 WL 931702 (W.D. Pa. 2006) (unpublished); Reaves v. Warden, 2002 WL 535398(M.D. Pa. 2002) (unpublished); Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir.2001); Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001); Ralk, 81 F.Supp. 2d at 1380; Jama v. I.N.S., 22 F.Supp.2d 353, 365 (D. N.J.1998); White v. Paulsen, 997 F.Supp. 1380, 1387 (E.D.Wa.1998); Igartua De La Rosa v. United States, 32 F.3d 8, 10 n. 1 (1st Cir. 1994). By contrast, the Plaintiff has not cited to any decision concludting that the ICCPR to creates a private, enforcible right of action, independent of protections available under the United States Constitution. Whether it is couched in terms of standing, sovereign immunity, or some other legal doctrine, the clear weight of authority is that "absent any further actions by Congress to incorporate [the terms of the ICCPR] into

domestic law, the courts may not enforce them." Jama, 22 F.Supp.2d at 365.

[37] The Beazley court addressed, at least incidentally, the Plaintiff's argument here -- that the United States' reservation of rights under the ICCPR is inconsistent with the terms of the treaty, and thus, invalid. Beazley noted that in 1994, the United Nations' Human Rights Committee commented on the expression of reservations under the ICCPR, suggesting that a reservation that was incompatible with the treaty's terms could be deemed severable, and the terms of the treaty would remain effective. 242 F.3d at 264-65. In 1995, the Human Rights Committee "expressed its concern" that the United States' reservation was incompatible with the ICCPR and "recommended withdrawing that reservation." Id. at 265 (internal punctuation omitted). However, as Beazley notes, the Human Rights Committee may have "suggest[ed]" or "recommend[ed]" that the U.S. withdraw the reservation, but that the Committee "declined to attempt either to void or to sever the reservation." Id. The court expressly rejected the argument that the reservation "is invalid and must be severed," and found that "the reservation is valid." Id. at 266-67. Although Beazley arises in a different analytical context, the Court nevertheless finds that its reasoning and conclusions are persuasive. Accordingly, whether it be due to sovereign immunity, lack of standing,

or some other principle, the Court lacks subject-matter jurisdiction over the Plaintiff's claim against the United States, and that claim is dismissed.

[38] 2. Supreme Court Defendants' Invocation of Rooker-Feldman

[39] The State Defendants contend that the Court lacks subject-matter jurisdiction over this case because, among other things, the Plaintiff's claims are barred by the Rooker-Feldman doctrine. For reasons that will be explained in more detail herein, the Court considers this argument only as it relates to the Supreme Court Defendants.

[40] The Rooker-Feldman doctrine is invoked where a party who lost a case in state court commences a proceeding in a federal trial court in which the party seeks what, in substance, would be appellate review of the state judgment, based on an argument that the judgment itself violated the losing party's federal rights. Smith v. Mullarkey, 67 Fed.Appx. 535, 537 (10th Cir. 2003). Because federal appellate review of state court judgments can only be obtained in the United States Supreme Court, 28 U.S.C. § 1257, the Rooker-Feldman doctrine prohibits lower federal courts from exercising jurisdiction over claims that were "actually decided" by the state court, as well as claims that are "inextricably intertwined"

with claims decided by the state court. Smith, 67 Fed.Appx. at 537. A claim is "inextricably intertwined" with a state court judgment if the judgment caused, actually and proximately, the injury for which the federal plaintiff seeks redress. Id. at 538, citing Kenmen Eng'g v. City of Union, 314 F.3d 468, 475-77 (10th Cir. 2002).

[41] Analysis of the Rooker-Feldman issue in this case need not be belabored, as the 10th Circuit in Smith has already affirmed the dismissal on Rooker-Feldman grounds of claims by the Plaintiff very similar to those presented herein. In that case, the Plaintiff raised "twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights" relating to the Colorado Supreme Court's initial decision to deny the Plaintiff's application for admission to the bar. Id. at 536. The 10th Circuit found that "each of the plaintiff's claims is inextricably intertwined with the state court's denial of his application for admission to the state bar." Id. at 538. It explained that, "[d]espite [the Plaintiff's] protests to the contrary, it is clear that plaintiff's injury resulted from the state-court judgment, that his complaint in federal court sought only to upset that judgment, and that the resolution of his federal claims necessarily required consideration of the underlying state-court decision." Id. As a result, the 10th Circuit found that the claims were properly dismissed for lack of subject-matter jurisdiction on Rooker-

Feldman grounds. Id.

[42] It logically follows that if the Plaintiff's lawsuit attacking the Colorado Supreme Court's decision on his bar application is barred by the Rooker-Feldman doctrine, the instant lawsuit would also be barred. Like the prior case, this action alleges that the Plaintiff was injured as a result of a ruling by the Colorado Supreme Court; specifically, the Plaintiff's alleged injuries here arise from the Colorado Supreme Court's affirmance of the Colorado District Court's dismissal of his claims. 121 P.3d at 892. It is obvious that the relief the Plaintiff seeks in this case can only be awarded by upsetting the Colorado Supreme Court's decision. Put differently, it is impossible to honor the Colorado Supreme Court's ruling dismissing the Plaintiff's claims, but simultaneously hold that the Plaintiff's constitutional rights were violated by that dismissal.

[43] Finally, it is apparent that consideration of the Plaintiff's claims here will necessarily require the Court to examine the sufficiency of the Colorado Supreme Court's ruling, as the Plaintiff's central premise in this action is that the ruling is jurisdictionally defective. Accordingly, the Court finds that the claims against the State Defendants are barred by the Rooker-Feldman doctrine.

[44] The Plaintiff argues that recent Supreme

Court precedent calls the continuing vitality of the Rooker-Feldman doctrine into doubt, and suggests that to the extent the doctrine remains viable, it "violates the guarantee of due process of law and is thus unconstitutional." In support of his first premise, he points to Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005) and Lance v. Dennis, 546 U.S. 459 (2006).

[45] In Exxon Mobil, the Supreme Court observed that the Rooker-Feldman doctrine had been extended by the lower courts "far beyond the contours of the Rooker and Feldman cases." 544 U.S. at 283. In seeking to corral the doctrine, the Court held that it is applicable only in specific circumstances, that is "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 284. It specifically reversed a lower court's invocation of the Rooker-Feldman doctrine where the federal litigation was commenced defensively, while the state court proceedings were in process. The Exxon Mobil Court explained that "neither Rooker nor Feldman supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains sub judice in a federal court." Id. at 292.

[46] The Supreme Court revisited the Rooker-Feldman doctrine again the following year, in Lance. There, the state court conclusively resolved a lawsuit challenging a redistricting plan, and, later, a new suit on the same issue was filed by different parties in federal court. Id. at 459. The District Court dismissed the new suit under Rooker-Feldman, finding that the new plaintiffs, although not parties to the state court lawsuit, were nevertheless in privity with the losing side in that suit. Id. at 462. Once again, the Supreme Court "emphasize[d] the narrowness of the Rooker-Feldman rule," and repeated Exxon Mobil's articulation of when the doctrine applies. Id. at 464. It found that the lower court had misapplied the doctrine, insofar as the doctrine cannot be applied against non-parties to the state suit, and that the court's reliance on privity principles conflated Rooker-Feldman with the analytically-distinct doctrine of preclusion. Id. at 465-66.

[47] Obviously, the holdings of both Exxon Mobil and Lance are inapposite here -- the Smith v. Mullarkey case was concluded long before the Plaintiff commenced this action, and the Plaintiff here was a party to the state court action. The Plaintiff's invocation of Exxon Mobil and Lance is premised upon a statement by Justice Stevens in his dissenting opinion in Lance. Justice Stevens criticizes the Feldman case as "incorrectly

decided,"suggests that Exxon Mobil "finally interred the so-called Rooker-Feldman doctrine," and views the Court's decision in Lance as "properly disapprov[ing] of the District Court's resuscitation of a doctrine that has produced nothing but mischief for 23 years." 546 U.S. at 467-68. Beyond this passing observation, however, Justice Stevens' dissent does not discuss the Rooker-Feldman doctrine further. The Plaintiff appears to believe that Justice Stevens' dissenting opinion somehow vitiates the Rooker-Feldman doctrine in its entirety, but it is clear that neither Exxon Mobil nor Lance do that. Indeed, the majority opinions in both cases clearly recognize that the doctrine remains viable, especially in sutiuations such as this case.

[48] The Plaintiff also argues that the Rooker-Feldman doctrine "violates the guarantee of due process of law and is thus unconstitutional." In support of this proposition, he cites Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983). The Plaintiff misreads Wood. There, the court explained that Rooker-Feldman could only apply where the state-court loser had the opportunity to present his federal claims during the state proceeding. Id. "Interpreting Rooker to preclude a federal district court from considering an issue that the plaintiff had no reasonable opportunity to raise in state court," it explained, "might pose due process problems." Id. (emphasis added).

Needless to say, Wood does not stand for the proposition that the Rooker-Feldman doctrine is unconstitutional. Rather, it merely explains an additional element -- the opportunity to have raised the federal issues in state court -- that must be present before the doctrine can be applied.

[49] Although the Plaintiff does not specifically argue the point, the Court assumes that his citation to Wood is an argument that, in fact, he did not have an opportunity to raise his federal issues in state court. To the extent the Plaintiff makes such an argument, it is without merit. The Colorado District Court order in Smith v. Mullarkey that the Plaintiff sought to appeal from expressly stated that the Colorado Supreme Court "has exclusive jurisdiction" over the Plaintiff's claims. See Docket # 20-2 at 8-9. In his Notice of Appeal to the Colorado Court of Appeals, the Plaintiff appears to have recognized the problem of whether the Colorado Supreme Court could assume jurisdiction over the claims, identifying as one of the issues on appeal to be "Whether the Colorado Supreme Court, consistent with the limited grant of jurisdiction of article VI, Section 6(2) of the Colorado Constitution and People ex rel. City of Aurora v. Smith, can lawfully assume exclusive jurisdiction over all aspects of Colorado's bar admission process." Docket # 20-2 at 5. Although this articulation of the issue cannot reasonably be read to raise a federal

constitutional challenge to the propriety of the Colorado Supreme Court exercising jurisdiction over the claims in Smith v. Mullarkey, it is clear that the Plaintiff anticipated the possibility of the Colorado Supreme Court exercising allegedly improper jurisdiction over his claims, and that he had the opportunity to also raise identify his federal constitutional challenges to the possible assertion of such jurisdiction. Moreover, the Plaintiff has not disputed the State Defendants' assertion that, in seeking certiorari review from the U.S. Supreme Court, the Plaintiff specifically raised the same federal issues he presents here. See Docket # 52 at 3. Accordingly, the Court finds that the Plaintiff had a reasonable opportunity to raise any federal constitutional objections to the exercise of jurisdiction by the Colorado Supreme Court in the state-court proceedings, and thus, application of Rooker-Feldman is appropriate.

[50] Finally, the Plaintiff raises the argument that Rooker-Feldman does not apply because there is no valid state court judgment in this case. This tautological argument assumes that the Colorado Supreme Court's judgment is invalid because that court lacked jurisdiction to decide the issue. Besides committing the logical fallacy of begging the question, the Plaintiff's argument on this point misconstrues the elements of the Rooker-Feldman doctrine. Neither the Supreme Court nor the 10th Circuit have ever required that the validity of a

state court judgment be resolved before Rooker-Feldman could be invoked. See e.g. Exxon Mobil, 544 U.S. at 284 (referring only to "state court judgments," making no use of the word "valid"). By definition, every case in which Rooker-Feldman is properly invoked involves a state court judgment that the plaintiff challenges as invalid; a claim that challenges the validity of the state judgment is the sine qua non that animates Rooker-Feldman's concerns. If validity of the judgment was required before Rooker-Feldman could be invoked, there would be no need for the doctrine at all. Accordingly, the Court rejects the Plaintiff's arguments challenging the application of Rooker-Feldman, and finds that that doctrine compels the dismissal of the Plaintiff's claims against the Supreme Court Defendants for lack of subject matter jurisdiction.

[51] 3. Defendants Haines and Suthers

[52] Arguably, the claims against Defendants Haines and Suthers are not implicated by the Rooker-Feldman doctrine, because they do not necessarily turn on the invalidity of the state court judgment.*fn4 Construed liberally, the Amended Complaint's claims against Defendants Haines and Suthers appear to arise out of Defendants' Haines and Suthers' conduct in litigating the Smith v. Mullarkey case, rather than from the judgment itself.

[53] Defendants Haines and Suthers move to dismiss the claims against them on the grounds of qualified immunity. Government officials who perform discretionary government functions are entitled to qualified immunity from civil damages, provided their conduct does not violate clearly established rights of which a reasonable government official would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Once a defendant raises the defense of qualified immunity in the context of a motion to dismiss, a court must first determine whether the plaintiff has asserted a violation of federal law. Currier v. Doran, 242 F.3d 905, 917 (10th Cir.), cert. denied, 534 U.S. 1019 (2001); see also Ramirez v. Dept of Corrections, 222 F.3d 1238, 1244 (10th Cir. 2000); Dill v. City of Edmond, 155 F.3d 1193, 1204 (10th Cir.1998). A court does not apply a heightened pleading standard with respect to a defendants' assertion of a qualified immunity defense but, rather, reviews the complaint under the traditional standards applicable to a motion to dismiss. See Currier, 242 F.3d at 916-917. The Court accepts the plaintiff's well-pleaded allegations as true, and determines whether the plaintiff has alleged facts sufficient to establish both that: (i) the defendant's actions violated a federal constitutional or statutory right, and (ii) that the rights violated were clearly established at the time of defendant's actions. See Finn v. New Mexico, 249 F.3d 1241

(10th Cir. 2001).

[54] Here, the Court finds that, even construed liberally and in the light most favorable to the Plaintiff, the Amended Complaint fails to state any cognizable federal constitutional claim against Defendants Haines and Suthers. The Court has carefully canvassed the Amended Complaint for specific references to Defendants Haines and Suthers, and finds the following:

[55] ¶ 18: "As Attorney General, Defendant Suthers is charged with the competent supervision of all Assistant Attorneys General under his command."

[56] ¶ 19: "Defendant Friedrick C. Haines has been, during all times pertinent to this matter, the Assistant Attorney General of the State of Colorado assigned to represent certain defendants in Smith v. Mullarkey, supra."

[57] ¶45: 'The Colorado Attorney General is 'the people's attorney,' charged with vindication of the rights of the citizens he serves (as opposed to representing the government's interests)."

[58] ¶ 46: "In campaign appearances, Attorney General John Suthers has stated that his mission as attorney general is to ensure that 'no man is above the law, and no one is beyond its

protection.'"

[59] ¶ 47: "As the attorney of record representing the Justices in Smith v. Mullarkey, Defendant Friedrick C. Haines knew or reasonably should have known that his clients had committed clear violations of federal and Colorado law."

[60] ¶ 48: "Defendant Haines either knew or had reason to know that, had he taken reasonable steps to alert the United States Supreme Court that a manifest violation of federal law had occurred, the Court would have been likely to have taken appropriate remedial action."

[61] ¶ 49: "Defendant Suthers was personally appraised by Plaintiff of the violations complained of herein via letter, personal contact, and on information and belief, communications transmitted via third parties."

[62] ¶ 50: "But for Defendants Suthers' and Haines' failure to act in a competent and professional manner, timely apprising appropriate authorities of the incident complained of, it is on information and belief virtually certain that Plaintiff's access to the courts would have been protected."

[63] ¶ 78 [In Plaintiff's Third Claim for Relief]: "Defendant Suthers acted with reckless and

deliberate indifference to Plaintiff's constitutional rights. As a direct and proximate result of his acts and omissions, Plaintiff's constitutional rights have been violated."

[64] ¶ 79: "Supervisors are liable for participating in or acquiescing to the deprivation of constitutional rights by those over whom they have supervisory control."

[65] ¶ 80: "On information and belief, Defendant Suthers knew at some point that one or more of named and/or unnamed Defendants over whom he had supervisory control engaged in conduct contravening clearly established constitutional rights of which a reasonable person in his position would have known."

[66] ¶ 81: "Defendant Suthers failed to take appropriate remedial action, thereby acquiescing to said unlawful conduct."

[67] ¶ 83: "Further, the constitutional rights Defendant Suthers violated are well-established and long-standing. As a result, his conduct contravened clearly established constitutional rights which reasonable persons would have known. Thus, his course of action was intentional, wanton, malicious, reckless, and oppressive, thereby entitling Plaintiff to punitive damages."

[68] Docket # 32.

[69] Turning first to whether these allegations state a claim against Defendant Haines, the Court notes that the Plaintiff has simply alleged that Defendant Haines was aware that his clients -- the Supreme Court Defendants -- had committed unspecified "clear violations of federal and Colorado law," and that Defendant Haines should have disclosed that fact to the U.S. Supreme Court. Even assuming that this allegation is sufficient to state a § 1983 claim against Defendant Haines for deprivation of the Plaintiff's *right of access to the courts,**fn5 the Plaintiff has not shown that it is "clearly established" that such conduct constitutes a constitutional infringement. To satisfy the "clearly established" prong of the qualified immunity inquiry, the party asserting the claim must show that the contours of the right were sufficiently clear that a reasonable official would have understood that what he was doing would violate that right. Brosseau v. Haugen, 543 U.S. 194, 198-199 (2004). This inquiry is made "in the specific context of the case, not as a broad general proposition." Id. at 198. Thus, to carry his burden of showing that the constitutional right infringed was "clearly established" at the time, the Plaintiff must point to caselaw from the U.S. Supreme Court or 10th Circuit that recognizes the existence of such a right in the "particularized" circumstances of the instant case. Id. at 199;

Price-Conelison v. Brooks, 524 F.3d 1103, 1108 (10th Cir. 2008), citing Cortez v. McCauley, 478 F.3d 1108, 1114-15 (10th Cir.2007) .

[70] The Plaintiff has not done so. In his response, the Plaintiff merely refers the Court to the various cases cited in his Amended Complaint as having "self-evident applicability to this case."*fn6 None of the cases cited in the Amended Complaint clearly establish the contours of any alleged right of access to the courts in the particularized circumstances presented here. Taking the allegations in the light most favorable to the Plaintiff, to show that the right allegedly infringed by Defendant Haines was "clearly established" at the time, the Plaintiff would have to cite to caselaw recognizing a violation of a litigant's constitutional right of access to the courts where a litigant's adversary failed to voluntarily alert a tribunal of an erroneous jurisdictional ruling against the litigant. The Plaintiff cites to no such case, nor has the Court's research revealed any such authority. Accordingly, the Court finds that Defendant Haines is entitled to qualified immunity on the Plaintiff's claims against him, and those claims are dismissed.

[71] Finally, the Court notes that as to the claims against Defendant Suthers, the Plaintiff has not alleged that Defendant Suthers himself engaged in any conduct that directly deprived the Plaintiff

of access to the courts. It is clear that all of the Plaintiff's claims against Defendant Suthers are derivative in nature, alleging that Defendant Suthers failed to adequately supervise Defendant Haines. Given that the Court has found both that Defendant Haines is entitled to qualified immunity for any conduct he is alleged to have personally participated in, logically, Defendant Suthers is entitled to qualified immunity as well.

[72] Accordingly, the State Defendants' Motion to Dismiss the Amended Complaint is granted.

[73] D. Remaining Motions

[74] Because the Court's decision above effectively dismisses all claims against all Defendants, there is no need to reach the remaining motions pending in this case. Those motions are denied as moot.

[75] CONCLUSION

[76] For the foregoing reasons, the Plaintiff's Motion for Recusal (# 43) is DENIED. Defendant United States' Motion to Dismiss for Lack of Jurisdiction (# 37) is GRANTED, and all claims against Defendant United States in the Amended Complaint are DISMISSED with prejudice for lack of subject matter jurisdiction. The State Defendants' Motion to Dismiss for Lack of

Jurisdiction (# 39) is GRANTED, and all claims against the Supreme Court Defendants are DISMISSED with prejudice for lack of subject matter jurisdiction, and the claims against Defendants Haines and Suthers are DISMISSED with prejudice on the grounds of qualified immunity. The Plaintiff's Motion for Judicial Notice (# 20) is GRANTED IN PART, insofar as the Court has taken judicial notice of the cited documents, and DENIED IN PART, insofar as the Court has disregarded the Plaintiff's accompanying argument as to the significance of the cited documents. The remaining Motions (# 6, 12, 18, 19) are DENIED AS MOOT. The Clerk of the Court is directed to modify docket # 46 to link to docket # 37 instead of docket # 39, and thereafter, to close this case.

[77] Marcia S. Krieger United States District Judge .

Opinion Footnotes

fn1 Instead of properly linking the Plaintiff's response to Defendant United States' Motion to Dismiss for Lack of Jurisdiction, the docket mistakenly links this filing to the Supreme Court Defendants' motion. The Clerk of the Court shall modify docket # 46 to link to docket # 37 instead of docket # 39.

fn2 A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another. Black's Law Dictionaryat 864 (7th Ed.).

fn3 Admittedly, one can legitimately question whether the requirement of construing pro se pleadings liberally applies in this case. Here, the Plaintiff is not a layperson, or otherwise unschooled in the law. Indeed, the issue underlying the Smith v. Mullarkey action was the Plaintiff's belief that he is entitled to be enrolled in the bar of the State of Colorado. In that respect, it might be more appropriate to subject the Plaintiff's pleadings to the same scrutiny applied to those of registered attorneys. Nevertheless, in the absence of authority compelling stricter review in these circumstances, the Court will liberally construe the Plaintiff's pro se pleadings.

*fn4 To the extent that the Plaintiff alleges either the first or second claims for relief against Defendant Haines and Suthers as well as the Supreme Court Defendants, those claims against Haines and Suthers are dismissed under Rooker-Feldman for the same reasons set forth above.

*fn5 Pursuant to Scott v. Harris, 127 S.Ct. 1769, 1774 & n. 4 (2007), it appears that this Court may be required to make a finding as to whether the

Plaintiff has pled a claim for deprivation of a constitutional right before it can turn to the question of whether such a right was clearly established. To the extent such a finding is necessary, the Court finds that the Plaintiff has failed to state any constitutional claim against Defendant Haines. Notably, the Plaintiff does not allege that Defendant Haines himself sought the transfer of jurisdiction from the Colorado Court of Appeals to the Colorado Supreme Court, argued in support of such transfer, opposed any request by the Plaintiff to return the matter to the Colorado Court of Appeals, or opposed the Plaintiff's petition for certiorari to the U.S. Supreme Court. Rather, the Plaintiff's apparent theory is that Defendant Haines' failure to simply accept and advocate for the Plaintiff's view of the case constitutes a denial of the Plaintiff's right of access to the Courts. Although denial of right of access to the courts may occur when a state actor conceals facts that, if disclosed, might enable a litigant to seek redress, see eg.g. Chappell v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003), the Plaintiff has not alleged any acts of active concealment by Defendant Haines. Accordingly, the Court finds that the Plaintiff has failed to state a constitutional claim against Defendant Haines.

*fn6 The Plaintiff makes practically no mention of Defendants Haines and Suthers in his discussion of qualified immunity in response (# 48) to the State

Defendants' Motion to Dismiss the Amended Complaint. He addressed Defendants' Haines and Suthers' defense of qualified immunity in slightly more detail in his response (# 14) to the State Defendants' initial Motion to Dismiss. The Court has considered both of the Plaintiff's response briefs in considering this issue.